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## **POLITICAL RECONSTRUCTION**





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## *ERRATA*

Page 223, line 35, read: Spain upon the fall of the Franco dictatorship will be in

Page 250, line 16, read: Gouin for Goupin.

Page 312, line 8, read: economic for political.

Page 406, line 33, read: pourront tolérer.

Page 419, line 26, read: pp. 456 note 5 for pp. 25; ff.

Page 439, line 29, read: 1944 for 1940.

Page 455, line 27, read: (685,969 to 224 votes)

Page 478, line 4, read: Aug. 30, 1925

Page 491, line 22, read: Gouin for Goupin.



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# POLITICAL RECONSTRUCTION

By KARL LOEWENSTEIN

*Professor of Political Science and Jurisprudence, Amherst College*

"Scisne, o filiole, quantula sapientia regitur mundus!"

CHANCELLOR OXENSTJERNA

"I do not indeed wish to see any nation have a form of government forced on them; but if it is to be done, I should rejoice at its being a free one."

THOMAS JEFFERSON

THE MACMILLAN COMPANY • NEW YORK

1946

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*To*

**HONORABLE HARLAN F. STONE**

**CHIEF JUSTICE OF THE UNITED STATES**

**WITH DEEP ADMIRATION AND AFFECTION**



## Preface

The journalist is at least reasonably certain that the editorial he wrote on the night before, still holds true on the next morning when it is read over the breakfast table, provided the reader does not turn on the radio. The political scientist trying to interpret this age of world revolution is in a less enviable position. All he can be sure of is that what he brought to paper in many nights under the rationed oil of the midnight lamp, will be hopelessly dated when at long last it reaches the bookstores. Many writers, therefore, well aware that they cannot keep up with contemporary history, blithely turn from facts to speculation. Hence the innumerable blueprints for a brave new world, the dreams out of the political Arabian nights, the products of a fertile imagination roaming at will over the no man's land of the "it ought to be."

Giving title to a book is always a difficult task; and the one given to this may be misleading. The volume is not just another stratospheric flight into utopia. It does not pretend to be another advance installment, in paper currency, to finance the coming millennium. If there is anything in which the author believes he can take pride, it is in not having turned out another finely wrought piece on the coming world organization, world federation, world peace. If anything, he is a prophet in reverse, who tries to envisage the future in the light of the past. He prefers to remain on the *terra firma* of established facts, historical experience, human nature in politics.

Yet this is a revolutionary book. It does not advocate the overthrow of the legally constituted government by force and violence—a method the accomplished Fifth Columnist of our time and age would scornfully term clumsy and old-fashioned; but it tries to overthrow, by argument and illustration, the



idol of internal sovereignty of the state. It is a frontal attack against one of the most firmly established maxims of the law of nations; to wit, that "other peoples' government is none of our business." The book has one central thesis; namely, that the right of every nation to choose the form of government it pleases, now enshrined in the Atlantic Charter, is the safest way to World War III.

To prove the thesis, a path had to be broken laboriously through the thicket of international law; bridges had to be built out of timber hewn from constitutional history; obstacles of constitutional law had to be cleared. The result is that whoever buys the book will make a good bargain. He will acquire for his library two or rather three books between the covers of one. Part One follows the doctrine of internal self-determination from its historical origin into the Atlantic Charter. Part Two explains what is meant when we speak of "the form of government." Part Three deals with the pertinent problem of whether or not, in our time, monarchy is a recommendable and permissible form of government. Part Four describes how the nations, through provisional governments, national assemblies, and constitutions, "choose" their form of government. Most of the material in the first four parts breaks new ground and has, to the author's knowledge, never been presented under this aspect or within the text of a single book. Finally, Part Five, paying the customary obolus to the speculative habits of the time, contains what the author believes to be a constructive proposal for the success of political reconstruction in Europe to which the book is dedicated. Probably this proposal will "take" with few readers who have had the patience to follow along the winding path of the thesis. But even though the author has few illusions as to the practical effect of his conclusions on statesmen and peacemakers, diplomats and international lawyers, he feels that there must be, at this crucial hour, someone who declares the *ceterum censeo*: Internal sovereignty must be destroyed if we are to have a breathing spell of one or two generations, let alone a stable and peaceful world order.

The author wishes to stress at this point that the book, whose basic idea was discovered some years ago, was written under the pressure of wartime. In addition to his current teaching obligations at Amherst College and the teaching for some time of members of the armed forces in the School of Overseas Administration of Harvard University, he was privileged to serve as Special Assistant to the Attorney General in the Department of Justice in Washington. Moreover, the completion of the final draft stood under a dead line occasioned by an impending official assignment abroad. This may explain why in some parts the literary documentation of the book is not as full as the author wished. It may also explain, and perhaps condone to some extent, any errors in fact that have crept into a volume which had to explore such vast expanses of history, international affairs, and the governments of many countries.

Finally, for the benefit of those readers who will complain that the material used in support of the main thesis is not up to date, it may be pointed out that the time-lag between the writing of a book and its publication is filled with breathtaking history in the making. The manuscript was completed in August, 1944; but publication was delayed partly by the author's economy. The final revision includes relevant events up to May, 1945. The author hopes that shortcomings beyond his or his publisher's control will not have substantially affected what he believes to be the message of the book.

The author is sincerely grateful to George H. Gibson of The Macmillan Company, for his invaluable work as copy editor of a manuscript which, in these exceptional circumstances, could not fail to require his expert assistance. Likewise he wishes to express his grateful acknowledgment to his secretary, Mrs. Evelyn V. Cooley, for her efficient service in typing a difficult manuscript.

KARL LOEWENSTEIN.

AMHERST COLLEGE

May 16, 1945



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*Part One*

THE DOGMA OF INTERNAL SELF-  
DETERMINATION

## CHAPTER I

### *The Atlantic Charter, Article 3*

Since that sunny day August 14, 1941, when President Roosevelt and Prime Minister Churchill, "being met" on board a British battleship off the shores of Maine, deemed it "right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world," the document entitled "The Atlantic Charter" has come to be regarded universally as the most momentous official proclamation on the nature of the peace the world shall enjoy after the Second World War. No other declaration, not even the Four Freedoms, equals it in prestige and acclaim. Subsequently, the "Joint Declaration of the United Nations," concluded in Washington on January 1, 1942, subscribed "to a common program of purposes and principles" as enunciated by the Atlantic Charter, and all states at war with the Axis, among them the Soviet Union, pledged themselves solemnly to its content.

As yet, nothing definite has been revealed as to how the Atlantic Charter was conceived and written. Perhaps some day the original will become one of the spiritual treasures of mankind exhibited under glass to the admiring populace.<sup>1</sup> Perhaps it will be forgotten. Later historians will know whether it was planned in advance as the crowning achievement of the meeting between the leaders of the two great democratic powers—one of which at that time was formally not yet at war—or whether it sprang at the spur of the moment from the constructive enthusiasm of the participants. External evidence

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See p. 405 for footnotes to this chapter.

is necessarily inconclusive; but it would suggest that the document was rather a spontaneous manifestation than the premeditated product of skilled draftsmanship. However that may be, the popular acclaim the Atlantic Charter deservedly has received justifies giving the principles proclaimed therein a sober analysis even if the textual form as such would not bear too close a scrutiny.

Four long years have elapsed since the Atlantic Charter was written. Although hailed as the promise of a better world if not the blueprint of the coming millennium, it has not escaped severe criticism. In particular, the principle of self-determination proclaimed in Article 2—the democratic leaders “desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned”—was challenged as an anachronistic restatement of the Wilsonian postulate (inherited from unconditional and unlimited nationalism of the nineteenth century) that every national group, however small or powerless, be permitted to form an independent and sovereign state of its own. Put to the acid test of the realistic requirements for drawing boundaries and reconstructing states, it has, to the regret of many, lost its absolute-ness; and few will deny that it has also lost much of its usefulness. Public opinion subsequently had to reconcile itself to the fact that, as authoritatively stated by leading statesmen, the principle is not applicable to the defeated Axis nations and their satellites, and that it is unworkable even in relation to members of the United Nations when confronted by the *Realpolitik* of the Soviets. •

It should be realized, however, that the term “self-determination” has a dual connotation both in theory and in practical application. Seen externally, it is the freedom of an ethnical group, or a nation, to organize itself as a state without foreign control. Seen internally, it is the freedom of a nation organized as a state to adopt for itself such political institutions and techniques as it deems fit, and to decide on its form of government as it pleases. This latter principle of internal self-determination or political autonomy is embodied in Article 3



of the Atlantic Charter, which reads: "*They respect the right of all peoples to choose the form of government under which they will live*; and they wish to see sovereign rights and self-government to be restored to those who have been forcibly deprived of them." The part of the sentence after the semicolon may be disregarded here. Obviously it refers to the concept of external self-determination, thus somewhat overlapping with and duplicating Article 2. It means that the states conquered militarily, or otherwise forced under the Axis yoke, should regain their previously enjoyed sovereignty and independence. In this sense it merely repeats one of Wilson's demands, formulated in his message to the Russian government of June 8, 1917: "No people must be forced under a sovereignty under which it does not wish to live."

The pledge of internal self-determination in Article 3 is stated in a categorical and unequivocal form. The right is granted to all peoples without any discrimination or qualification. Unless restricted by authentic interpretation, it would apply to the states in the camp of the United Nations and the states liberated from Axis domination no less than to the Axis nations themselves and their satellites. This interpretation appears to be supported by Articles 4 and 5 of the Atlantic Charter, which emphasize equality of all nations, while only Article 8 differentiates by singling out the aggressor nations for disarmament. Taken at its face value, it would mean nothing less than that any nation, the Axis nations not excluded, may choose whatever form of government it pleases, democratic, republican, monarchical, authoritarian, dictatorial, totalitarian, fascist, Nazi, Soviet.

#### OFFICIAL INTERPRETATIONS OF ARTICLE 3

Article 3 of the Atlantic Charter has met surprisingly little comment, let alone censure. The postulate of internal self-determination contained in it is taken for granted by public opinion. It conforms to an established rule of international law, and to the practice of international relations. Difficulties in application are not foreshadowed. Its acceptance is near-unani-

mous.<sup>2</sup> However, official interpretations on the part of leading statesmen of the United Nations subsequently qualified Article 3 to some extent. Among these the following may be noted here: The Moscow Conference of November 1, 1943, in the "Joint Four Nation Declaration," contains an indirect reference to the Atlantic Charter in that Point 4, envisaging a general international organization, restricted membership in it to all *peace-loving* nations and confined the principle of the sovereign equality to all *peace-loving* nations, thus seemingly excluding nations which are not so qualified.\* In the declaration regarding Italy it is stated:

Allied policy towards Italy must be based on the fundamental principle that fascism and all its evil influence and configuration shall be completely destroyed and that the Italian people shall be given every opportunity to *establish governmental and other institutions based on democratic principles*. [Italics supplied].

This attitude was implemented by Prime Minister Churchill's address to the Commons of May 24, 1944:

It is understood throughout Italy, and it is the firm intention of the United Nations, that Italy, like all other countries which are now associated with us, shall have fair and free opportunity as soon as the Germans are driven out, and tranquillity is restored, of deciding whatever form of *democratic* government, whether monarchical or republican, they desire.

I emphasize the word *democratic* because it is quite clear that we shall not allow any form of fascism to be restored or set up in *any country with which we have been at war*. [Italics supplied.]

On the other hand, the Moscow declaration on Austria did not specify the form of government permitted to the Austrians after the expulsion of the Nazis, except by stating:

They wish to see re-established a free and independent Austria and thereby to open the way for the Austrian people themselves, as well as those neighboring states which will be faced with similar problems, to find that political and economic security which is the only basis for lasting peace.

\* For a fuller discussion of this formula see *infra*, p. 381.

Secretary of State Cordell Hull in his address of April 9, 1944, took visible pains to loosen up the rigidity of the Atlantic Charter as follows:

There has been discussion recently of the Atlantic Charter and of its application to various situations. The Charter is an expression of fundamental objectives towards which we and our allies are directing our policies. . . . *It is not a code of law from which detailed answers to every question can be distilled by painstaking analysis of its words and phrases. It points the direction in which solutions are to be sought; it does not give solutions. It charts the course on which we are embarked and shall continue. That course includes the prevention of aggression and the establishment of world security. The charter certainly does not prevent any steps, including those relating to enemy states, necessary to achieve these objectives.* [Italics supplied.]

While these restrictions mainly pertain to the problems of external self-determination it may be concluded that they refer likewise to the choice of the form of government. This is brought out with more clarity by President Roosevelt's Lincoln Day address of February 12, 1943. After asserting that the French people will be represented by a "government of their own popular choice" it continues:

It will be a free choice in every sense. *No nation in all the world that is free to make a choice is going to set itself up under the fascist form of government, the Nazi form of government, or the Japanese war-lord form of government.* Such forms are the offspring of seizure of power followed by the abridgment of freedom. Therefore, the United Nations can properly say of these forms of government two simple words: "*Never again.*" The right of self-determination included in the Atlantic Charter does not carry with it the right of any government to commit wholesale murder or the right to make slaves of its own people or of any other peoples in the world. [Italics supplied.]

At a later point \* the question will be taken up whether this statement implies that no nation, if it is genuinely free, would, of its own volition, choose a dictatorial form of government, or whether it suggests that such a nonpermissible

\* See *infra*, pp. 111 ff.

form would be prevented by the United Nations even if a nation which is free resorted to it. But it is evident that the Atlantic Charter is not meant to apply indiscriminately to all peoples of the world as originally stated.

A most important clarification, from an official source, of the term of internal self-determination came by Mr. Churchill in his address to the Commons of May 24, 1944. Speaking of the postwar role of Britain, he stated:

Next is that the Atlantic Charter remains the guiding signpost expressing the vast body of opinion among the powers now fighting together against Germany. The third point is that *the Atlantic Charter in no wise binds us about the future of Germany*. It has no quality of a bargain or contract with our enemy. It was not an offer to the Germans to surrender. If it had been an offer that offer would have been rejected.

But the principle of unconditional surrender . . . wipes away all idea of anything like Mr. Wilson's Fourteen Points being brought up by the Germans after their defeat, claiming that they surrendered in consideration of those Fourteen Points.

I have repeatedly said that unconditional surrender gives the enemy no rights. . . . There is no question of Germany enjoying any guarantee of any kind that she will not undergo territorial changes if it should seem that the making of such changes would render more secure and more lasting the peace of Europe. [*Italics supplied.*]

This clarification is gratifying when it is remembered that, after the First World War, Wilson's Fourteen Points, likewise proclaimed as a universalist design, were at once capitalized on by the defeated nations and turned into a weapon for the successful sabotage of the peace treaties.

While, thus, it seems clear beyond doubt that the Germans and the Japanese would not be permitted to derive from the Atlantic Charter any claims as to either their form of government or their consent to territorial changes, Mr. Churchill none the less emphasized that the war has been stripped, to a considerable extent, of its ideological features and is more subjected to considerations of *Realpolitik*. In this sense Mr. Churchill's reservations concerning the right of internal self-determination

of non-enemy states deserve more than passing attention because they reflect the ingrained British tradition of the principle of "hands off" from the internal affairs of other nations. Speaking of France and the claim of General de Gaulle's French Committee of National Liberation, which shortly before had rechristened itself "French Provisional Government," Mr. Churchill declared:

The reason why the United States and Great Britain have not been able to recognize it as the government of France or even as the provisional government of France is because we are not sure it represents the French nation in the same way as the governments of Great Britain, the United States and Soviet Russia represent the whole body of their people. . . . *But we do not wish to commit ourselves at this stage to imposing a government on any part of France which might fall under our control without more knowledge than we now possess of the situation in the interior of France.* [Italics supplied.]

Even more revealing was Mr. Churchill's attitude toward neutral Spain, ruled at that time by a dictatorship no less distasteful to democratic opinion throughout the world than fascism and Nazism. Said Mr. Churchill:

I am here today to speak kindly words about Spain. . . . *The internal political arrangements are a matter for the Spaniards themselves. It is not for us to meddle in these affairs as a government.* . . . We do not include in our program of world renovation any forcible action against any government whose internal form of administration does not come up to our ideas, and any remarks I have made on that subject refer only to enemy powers and their satellites who will be struck down by the force of arms. They are the ones who have ventured into the open and they are now the ones whom we shall not allow again to become the expression of those particular doctrines associated with fascism and nazism, which undoubtedly have brought about the terrific struggle in which we are now engaged. Surely anyone can see the difference. [Italics supplied.]

Marshal Stalin on his part also made a contribution to the subject by announcing, through Foreign Minister Molotoff, on April 2, 1944, when the Russian armies began to enter

Rumanian territory, that Soviet Russia would not interfere with "the social and political structure" of territories Russia does not consider as its own. How far the Soviets have lived up to this declaration of intention will be discussed at a later stage.\* Although the evidence available on the attitude of the Soviet toward the internal affairs of Axis satellites conquered and occupied by its armies is at best fragmentary, it warrants the conclusion that Stalin's declaration is given in practice a rather elastic interpretation.

The principle of internal self-determination in Article 3 of the Atlantic Charter moved into the focus of public attention when the United Nations, or rather the British government, found it expedient to intervene in the internal affairs of Italy, Belgium, Greece after their liberation from Axis control. It may suffice to quote a relevant and revealing passage from Prime Minister Churchill's address before the Commons on November 29, 1944—that speech which contains his by now celebrated interpretation of the word "democracy":

But at least we know . . . what is our objective. It is that these countries shall be freed from German armed power and under conditions of normal tranquillity shall have a free universal vote to decide the government of their country—except a Fascist regime—and whether that government shall be of the left or of the right.

In the same speech Mr. Churchill affirmed:

Whether the Greek people form themselves into a monarchy or republic is for their decision; whether they have a government of left or right is a matter for them.

The adherence to the "principles and purposes of the Atlantic Charter" was solemnly reaffirmed, without any qualification, by Resolution XII of the Final Act (March 8, 1945) of the Inter-American Conference at Mexico City on Problems of War and Peace.

Last but not least, the principle of the free choice of the form of government is specifically referred to in the Crimea

\* See *infra*, pp. 74 ff.

Conference of the "Big Three" of February, 1945. The report on the conference of Yalta declares on this point:

the establishment of order in Europe and the rebuilding of national economic life must be achieved by processes which will enable the liberated peoples to destroy the last vestiges of Nazism and Fascism and to create democratic institutions of their own choice. This is a principle of the Atlantic Charter—the right of all peoples to choose the form of government under which they will live—the restoration of sovereign rights and self-government to those peoples who have been forcibly deprived of them by the aggressor nations. [Italics supplied.]

One should not subject a political document, which in content and style reflects its character as a hard-won product of compromise, to the critical analysis which would befit a formal international treaty. Its authors seemingly tried to square a circle, which had become vicious into the bargain. While, in the first half of the paragraph quoted, the liberated peoples are granted the right "to create *democratic* institutions of their own choice" (and no others), the two separate propositions contained in Article 3 of the Atlantic Charter—to wit, free choice of government for all nations and restoration of self-government for the liberated nations—are fused into one principle in the second half of the paragraph. The former postulate is being absorbed by the latter, and the crucial question as to whether a nation may choose the form of government it pleases, is answered in a rather oblique way by the expectation that the liberated peoples will settle upon democratic institutions of their own choice. President Roosevelt's report on the Crimea Conference in his message read before Congress on March 1, 1945, touched on the problem only in passing:

The three most powerful nations . . . will join together during the temporary period of instability after the hostilities, to help the people of any liberated area, or of any formed satellite state, to solve their own problems through firmly established democratic processes.

But he added significantly:

Of course, once there has been a free expression of the people's will in any country, our immediate responsibility ends—with the exception only of such action as may be agreed upon in the international security organization.

### THE PRINCIPLE OF NONINTERVENTION IN THE INTERNAL AFFAIRS OF OTHER PEOPLES

From these statements it may be concluded that the official policy of the United Nations, at the present juncture, is to respect the right of all nations, except the Axis states proper, to choose for themselves the form of government under which they will live. Unless successfully exposed to the pressure of public opinion of the world, neutrals may even organize themselves as totalitarian dictatorships if they wish. This applies evidently not only to Franco Spain—in case it survives—whose neutrality in the past was as questionable as its totalitarian character was unquestionable, but likewise to Argentina, which became a military dictatorship June 4, 1943, and has subsequently been garnished by all trimmings of virulent fascism. And it applies of course to any nation belonging to the group of the United Nations, whatever its internal political system at present or in the future. Thus, for example, Soviet Russia and China, considered by many to be no less totalitarian and dictatorial in character than Mussolini's Italy and Hitler's Germany, would continue to claim for themselves the full right of internal self-determination.

Nor do the statements of the leaders of the United Nations indicate in any way how they would prevent—if this is what they intend—Germany or Japan, or any other nation for that matter, from "choosing" a form of government which, though outwardly democratic and constitutional, camouflages authoritarian, dictatorial, or totalitarian intentions.

It is submitted here that, if Article 3 means what it says—namely, that any nation may choose the form of government it pleases, and that, consequently, the internal affairs of other nations are none of our business—the prospects for a Third World War are more than fair. This book should be consid-



ered as a frontal assault against Article 3 of the Atlantic Charter. Expressed in the concisest possible formula, its thesis

No nation after this war—least of all, the defeated Axis states and their satellites—must be permitted to choose a form of government which fails to conform to political democracy. An international organization, the basis of lasting peace in a new world order, is possible and effective only if the states composing it adhere internally to the principles of the constitutional-democratic state. By political democracy or the constitutional-democratic state is understood here a political organization in which the government is appointed by the people or their representatives, and at any time remains answerable to the people for the conduct of office. In order to achieve this aim, it is further submitted, the doctrine of internal self-determination must be abandoned.

These propositions are in a head-on collision with accepted maxims of international law, no less than with the established practice of international relations. Experts in both fields will realize at once that any attempt at eliminating the concept of internal sovereignty of states—or, as it is called here with more precision, of internal self-determination—is bold to the point of being revolutionary. "Realists" will even call it absurd. Freedom of any independent state from interference from outside with its domestic order is one of the basic verities of what purports to be the existing international order. Internal self-determination, sometimes referred to in the theory of international law as territorial and personal supremacy, is the logical result of the equality and the independence of states—the two pillars of our international law. A state is not independent, nor is it equal to others, unless it is free from intervention in its domestic affairs. The freedom of other nations to choose their own form of government is commonly reflected in the tenet, more deeply ingrained in universal consciousness than any other of internal relations, that other peoples' government is none of our concern.

It is not intended to enter here into a full-sized discussion of the duty of nonintervention which is the corollary of the

right of internal self-determination. It is a vast territory of international law where even angels tread with caution. Intervention and nonintervention come within the purview of this book only in so far as they pertain to the internal organization of a state. With the varied and controversial problems of nonintervention in the external position of states, a duty more honored in the breach than in the observance, we are not concerned here. The doctrine of nonintervention in the internal affairs of other states is not at all controversial. On the contrary, prior to its brazen violation by the contemporary dictatorships, it was one of the few, the very few, unanimously and universally accepted rules of the law of nations.

## CHAPTER II

### *Nonintervention in Internal Affairs, in Historical Perspective*

The reader who is able to muster enough patience to follow a streamlined historical review will find that the doctrine of nonintervention is relatively recent in origin and even is not free from exceptions and deviations.

#### THE ERA OF THE ABSOLUTE MONARCHY <sup>1</sup>

From the time of the Renaissance, when Jean Bodin's concept of absolute sovereignty provided the rising national state with the working formula for justifying the concentration of political power in the hands of the absolute ruler, the right of intervention in the government of other states was widely practiced for reasons of power politics. Dynastic and religious reasons were the convenient pretexts during the Reformation for interfering with the internal affairs of other states. However, dynastic solidarity militated successfully against intervention from without in the relations of the prince and his subjects. The school of Natural Law, from which the modern law of nations emerged, was divided on the issue. Grotius held intervention by other states justified in case of manifest oppression of a people by its government, Vattel and Christian Wolff repudiated it because of the assumed equality of states. But under the dominant concepts of both the patrimonial state and dynastic universalism the problem received little attention.

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<sup>1</sup> See pp. 405-417 for footnotes to this chapter.

## THE FRENCH REVOLUTION

However, during the French Revolution the right of intervention in the domestic affairs of foreign nations could not fail to grow into an issue of the first political and ideological magnitude.<sup>2</sup> The French Revolution logically derived from Rousseau's revolutionary democratism the idea of nationalism in conformity with the postulate of internal sovereignty and external self-determination. At first intervention was closely linked to the traditional legitimacy of the dynasty and the monarchical establishment. The Convention of Pillnitz (August 27, 1791) between the sovereigns of Austria and Prussia, Austria's ultimatum of April 7, 1792, and the Prussian manifesto of July 15, 1792, admittedly were directed against revolutionary France for "the maintenance of the essential bases of monarchical government in France." Against the legitimist intervention of the first coalition (1791-1792); France most emphatically claimed the right to full internal self-determination. The concept of the free will of the individual in a world free from feudal authority is applied to the free will of the state to organize itself independently from any outside restraint. The state is subject to no authority except its own sovereign decision. Self-determination of man is reflected in self-determination of the nation. Consequently, intervention is illegitimate and must not be tolerated. By virtue of its inalienable natural freedom any state must have the exclusive right to determine its internal affairs, or, in the parlance of the Revolution, its constitution. The Resolution of the Convention of April 13, 1793, proclaimed the right of internal self-determination as a basic principle of the law of nations.<sup>3</sup> The same principles are solemnly inserted in the text of the Constitution of June 24, 1793.<sup>4</sup> Condorcet went even a step further and raised the principle to a general maxim of the law of nations, based on the equality of states and the right of popular sovereignty.<sup>5</sup>

But the French Revolution is Janus-headed here as in many other matters. Enthusiasm for its own militant principles drove

it logically into the *coincidentia oppositorum*. At the same time as the right of intervention is denied to other nations, at right is claimed and justified when it serves to impart to others the blessings of the democratic trinity of liberty, equality, and fraternity. The Fifth Column is by no means an invention of our time. The technique was practiced by revolutionary France as the legitimate method for the democratic and republican redemption of enslaved nations. Under the impact of Rousseau's doctrines the Convention was bound to become missionary and to arrogate to itself the right of converting other nations to the revolutionary form of government. The right of revolutionary intervention is motivated by the assumed solidarity of all nations in the defense of liberty. All peoples are allied in the fight against oppressive, liberty-destroying government, which includes the right of international revolutionary propaganda. Revolutionary France, it is proclaimed, has the holy mission to carry the torch of freedom to other nations. Thus, the Constitution of June 24, 1793, declared (Article 118): "Le Peuple Français se déclare l'ami et l'allié naturel des peuples libres." A revealing article of the Girondist Constitution of 1793, laying down the rules of political conduct for the republican armies of occupation, could well have served as the motto for the military government of the United Nations in occupied and liberated territories.<sup>6</sup> Robespierre, in a particularly highfalutin piece of revolutionary semantics, lashes out against the kings as the enemies of all mankind, to be attacked by all and to be treated as common criminals.<sup>7</sup> The decree of December 15, 1792, instructed the generals in occupied territories to abolish at once feudal rights and privileges, to proclaim the sovereignty of the people to remove all existing authorities, and to convene the people in primary assemblies for the determination of their own government.<sup>8</sup> In its later development the French Revolution was led, by its dual standard of revolutionary morality, to force its form of government on whatever countries the victorious armies had entered. Intervention in other nations' domestic affairs was camouflaged, with more or less

skill, by the revolutionary invention of plebiscites (Avignon, Savoy, Belgium, Geneva) staged under the flag of national self-determination. The historical precedent was not lost to revolutionary intervention of the totalitarian states of our own time, which legalized (as legality goes) conquest by fake plebiscites as it occurred in Austria and the Sudetenland after the Nazi "liberation," and in the Baltic States when Russia "redeemed" them for the Soviet system. Revolutionary periods manifest an amazing parallelism of political techniques.

For Napoleon, executor of the testament of the French Revolution, intervention was the indispensable instrumentality of Imperial and imperialistic control. No respecter of foreign states or governments, traditions or institutions, he established everywhere the French version of absolute monarchy under puppet governments. But to compare his regime to Hitler's New Order is as blasphemous as to identify the Nazi doctrines with the immortal verities of the French Revolution. Whatever European state had shared in the Napoleonic system of economic progress, legal security, social equality, had been touched by the wave of the future. It is unlikely that the nations forced into the New Order of Europe will ever remember the Hitler regime otherwise than with curses.

#### IMMANUEL KANT

Kant had passed his seventieth year when, in 1795, he published his famous *Philosophical Essay on the Eternal Peace* (*Philosophischer Entwurf zum ewigen Frieden*).<sup>9</sup> Within Kant's work this tenet is important as a contribution to the wider field of the metaphysical foundation of morals whose political capstone is the categorical imperative: "There shall be no more war."<sup>10</sup> Famous as this essay has become, as the ardent appeal for peace by Germany's greatest philosopher, it is nowadays more quoted than read. Otherwise it would be hardly intelligible that his postulates of peace among nations and a world federation among sovereign states has inordinately overshadowed the fact that he discovered the requisite of any world organization: that world peace can be maintained only

if and when all states have adopted a "republican" constitution—meaning, in the language of his day, a form of government with representative institutions. It is the form of internal government which determines ultimately the character of the world society. There can be, he declares, no genuine world community, governed by the spirit of "universal hospitality," unless all states conform to an internal order in which the power to decide on war is in the hands of the people instead of the princes, rulers, and governments. A lifelong admirer of Rousseau, and an enthusiastic believer in the universalism of the French Revolution, the prophet of Königsberg did not permit his humanitarian optimism to be deflected or diluted by the excesses of the revolution which was about to complete its cycle. He firmly believed that the principles of right and justice are an objective reality in the life of individual nations and in the intercourse between the nations. His importance for the history of the doctrine of nonintervention lies in the irresistible logic which fused into an indivisible whole the postulates of internal self-government and universal republicanism as the prerequisites of world federation and world peace.

The brief essay consists of six "Preliminary" and seven "Definitive" Articles. Among the former group is one worded as follows: "No state shall intermeddle by force with the constitution or government of another state" ("Kein Staat soll sich in die Verfassung und Regierung eines anderen Staates gewalttätig einmischen"). This absolute prohibition of intervention in the domestic organization of other states applies even to the case of civil war, because such interference would make the autonomy of all other states insecure. However, such proclamation of internal sovereignty is to be understood in connection with the first of the "definitive" articles: "The civil constitution in every state shall be republican." A republican constitution is sharply distinguished from a democratic form of government, as it was customary in contemporary terminology of which the United States Constitution is an illustration. As to the form of government, states are either republican or despotic. A republican constitution is one that is founded on

the liberty of the members of the society as men, and on the equality of its members as citizens: "Republicanism, regarded as the constitutive principle of a state, is the political severance of the executive power of the government from the legislative power." "Despotism is in principle the irresponsible executive administration of the state by laws laid down and enacted by the same power that administers them." By this token democracy is necessarily despotism. Next to liberty and equality, the principle of representation constitutes the criterion of republicanism. "But if the mode of government is to conform to the idea of right it must embody the representative system." For this reason the republican constitution is the only one which can lead to a perpetual peace. "And the reason of this may be stated as follows: According to the republican constitution the consent of the citizens as members of the state is required to determine at any time the question whether there shall be war or not. Hence, nothing is more natural than that they should be very loath to enter upon so undesirable an undertaking; for in decreeing it they would necessarily be resolving to bring upon themselves all the horrors of war. . . . On the other hand, in a constitution where the subject is not a voting member of the state and which is, therefore, not republican, the resolution to go to war is a matter of the smallest concern in the world." It is only on this universal basis of republicanism as the form of government, and on the assumption that the people themselves control their government, that the next "definitive article," on which the reputation of the Kantian philosophy of war and peace is predicated, is intelligible: "The law of nations shall be founded on a federation of free states." The world constitution is a parallel to the civil constitution. A world federation is effective only among states similar in their civil constitution, which must be republican. The world society of peace cannot exist unless it is founded on the political homogeneity of the states composing it. No other writer, ancient or modern, has equaled or surpassed Kant in the recognition that world peace and world federation are possible only between states with like constitutional organiza-



tions and political ideals. This is what imbued the booklet with so much modernity and actuality.

#### THE HOLY ALLIANCE AND INTERVENTION

The reconstruction of Europe after Napoleon's fall, attempted by the Treaties of Vienna (1814 and 1815) and Paris (1815), would deserve as much the attention of the peacemakers after the Second World War as Versailles.<sup>11</sup> Our study is not concerned with the diplomatic tug of war and the game of power politics among the United Nations, style 1815, which formed the Quadruple Alliance of England, Russia, Austria, and Prussia. Ferrero's work has contributed much to the rehabilitation of the settlement of 1815.<sup>12</sup> But for the evolution of the dogma of nonintervention in the internal affairs of other nations the period is remarkable in that, for the first time, men who were no fools—this is the least that can be said of Metternich, Alexander I, Hardenberg—seriously considered insistence on the homogeneity of the internal governmental order as a suitable method for maintaining the stability of Europe. One point must be emphasized: one may retrospectively disapprove of the effort the peacemakers of Vienna made to "freeze" the form of government they preferred (namely, legitimist and authoritarian monarchy) at the expense of the more progressive forms of liberalism and democracy—then the "red menace scare" of the governments, and their immediate targets of repression. But the ultimate triumph of the liberated state should not lessen the value of the underlying idea; to wit, that homogeneity of internal governmental structure, if it is in itself progressive and democratic, may well be instrumental to the maintenance of peace and the stability of world order. The fact that the European Alliance was directed toward antiliberal objectives has unduly obfuscated an unprejudiced approach to a political principle which, whatever may be said against its ideologies, stabilized the peace of Europe for two generations—a decidedly better record than the system of Versailles, which not only accepted the diversity of the form of government as the natural basis of the community of na-

tions but, in addition, did nothing to prevent the dictatorships from ultimately destroying the international order. In this sense the policy of the European Alliance of 1815 and after was much more sensible, and imparts lessons for the future which our own time cannot easily ignore.

The Final Act of the Congress of Vienna (signed June 9, 1815) and the Treaty of Paris of November 20, 1815, were primarily intended to curb France, the eternal aggressor, still distrusted by the victors even after she had coordinated herself with the European concept of dynastic legitimacy.<sup>13</sup> The peace treaties proper were severe encroachments upon the internal sovereignty of the defeated nation. Among the conditions were: military occupation of large parts of her national territory; heavy war indemnities; the establishment of a permanent Committee of Ministers of the victorious powers in Paris to which the French cabinet had daily to report, and which at any time could tender advice hardly to be disregarded in view of the army of occupation. This system of internal controls amounted to nothing less than political tutelage over France. Likewise in the general political supervision of Europe, Napoleon's dictatorship over Europe was supplanted by the domination of the Allied Powers. But their solidarity, beyond their common aim to defeat France, was artificial and brittle from the start. England, constitutionally farther advanced than the still semi-feudal system of her monarchical allies on the continent, was willing to cooperate only to the extent of holding down France until the latter had given sufficient proof of no longer being a menace to European security. Even so, she was reluctant to interfere too much with the internal conditions in France. But the scheme of the Holy Alliance proper, devised by Alexander I and announced by him on September 14/26, 1815, was far more ambitious, and claimed for the Allied sovereigns the right to interfere with the internal affairs of any country showing inclination to depart from dynastic legitimacy—considered by its author as the only respectable form of government. Seen retrospectively, the scheme was much more than "a piece of sublime mysticism and nonsense," according to Lord Castle-

reagh's much quoted words. To the inventor of the plan the time seemed propitious for the creation of a Christian brotherhood of princes and the tutelage of the princes over their peoples as their children. It was the universalist answer of authoritarian romanticism to the missionary claims of revolutionary rationality, just as the League of Nations should have been destined to fill the spiritual vacuum left by what was hoped to be the end of nationalism. In due course this family compact of the rulers of Europe, still a group of considerable homogeneity and solidarity, was signed by all sovereigns, large and small, except the Prince Regent in Great Britain (who was constitutionally prevented from joining), the Pope (who declined), and the Sultan (who was not invited). The French King was to be admitted later.

It was the issue of generally permissible and, under certain conditions, even mandatory intervention in the internal affairs of sovereign states which caused England to break away from the Alliance. Castlereagh, far from endorsing the scheme of a European federation, did not wish to make the powers "the umpire in the constitutional struggles of France"; nor did he consider the plan of regular conferences of the powers forming the Concert of Europe "for the examination of measures most salutary for the peace and prosperity of the nations and the maintenance of peace" <sup>14</sup> as a commendable method for the supervision and control of the internal situations of the states. In the conference convened at Aix-la-Chapelle on October 1, 1818, France, building skillfully on the foundations laid by Talleyrand in Vienna, had extricated herself from the "shackles" of the peace treaty. It was agreed that the Allied occupation army should be evacuated by November 30. At the conference once again Alexander's utopian idealism, bent on guaranteeing the *status quo* and legitimist sovereignty against revolution, clashed with British *Realpolitik*. Castlereagh, following the cabinet instructions of September 4, 1818, strongly objected to internal intervention, the foremost instrumentality for maintaining "the brotherhood of princes and peoples": "For nothing could be more injurious to the idea

of government generally than the idea that their force was collectively to be prostituted to the support of established power without any consideration of the extent to which it was abused." This basic difference no diplomatic legerdemain could overcome. The result was a compromise to the effect that partial or *ad hoc* reunions of the powers—to which Britain had agreed while opposing general conferences—concerning the internal affairs of other states would not be held without their invitation and, if desired, their presence. Nor would Britain consent to the Prussian plan of maintaining the Allied troops under Wellington, withdrawn from France to Brussels, as a sort of European police for emergency purposes.<sup>15</sup>

Soon after Aix-la-Chapelle the precariously sustained Concert of Europe was confronted with the wave of revolutionary unrest which swept over Europe and the New World. Kotzebue's assassination (March 23, 1819) led to the ruthless repression of liberalism in the Carlsbad decrees (September 21, 1819) and the Final Act of Vienna "on the completion and consolidation of the German Federation" of May 15, 1820.<sup>16</sup> Britain through Castlereagh protested against the fierce reaction of the Carlsbad decrees as unjustifiable interference with the internal affairs of sovereign and independent states. However, the assassination of the Duke of Berry, the French heir presumptive (February 13, 1820), was seized by the reaction as the legitimate pretext for making intervention a reality. Alexander offered to crush the rebellion in Spain, provoked by the ferocious oppression of the sinister Ferdinand VII, with a Russian army "in the name of Europe" and proposed the reestablishment of the Allied Committee of Ministers for the supervision of France. But Russia's shadow over Europe had become too deep for the comfort of Metternich and Castlereagh. Conflicting interests were breaking the fragile fabric of the Concert of Europe into pieces.

The next turn was Austria's, which had a slightly better legal case for intervention in Naples where long-suffering Italian liberalism had exploded against King Ferdinand. Metternich claimed the right of intervention on the basis of the treaty

between Austria and Naples of June 12, 1815, which enjoined on the King not to introduce any constitutional arrangements inconsistent with those in the Austrian territories of the peninsula. Intervention in Italy was the main issue of the Conference of Troppau (October 21, 1820) from which Metternich emerged as the dominant spirit of what was left of the Concert of Europe. The famous Protocol of November 19, 1820, signed by Austria, Russia, and Prussia only, embodied in unequivocal terms the right of intervention in the internal affairs of other states, justified by European solidarity in the political *status quo*: "States which have undergone a change of government due to revolution, the results of which threaten other States, *ipso facto* cease to be members of the European Alliance, and remain excluded from it until their situation gives guarantees for legal order and stability. If, owing to such alterations, immediate danger threatens other States, the Powers bind themselves, by peaceful means, or if need be by arms, to bring back the guilty State into the bosom of the Great Alliance."<sup>17</sup> To those who are able to divest themselves of the traditional value judgments of liberal historiographers, this document, clearly realizing that the internal form of government of one state is bound to affect the security of the other states, has a remarkably modern and timely overtone.

Britain's attitude toward the Troppau Protocol manifested even more definitely than before the tendency to consider intervention in the internal affairs of other nations as plainly illegal. Castlereagh, in his instructions to Lord Stewart, the Ambassador in Vienna (December 16, 1820), refused to stretch England's treaty obligations beyond their specific objective; namely, France. He objected to bolstering unpopular rulers by foreign arms; he refused to subscribe to the tenet of legitimist solidarity against revolution. "Intervention is destructive of all correct notions of internal sovereign authority."

The subsequent continuation of the discussion at Laibach (January, 1821) failed to alleviate the tension centering on the practice of intervention. The coming split of Europe into two opposing groups—the constitutional states, England and

France, and the autocracies, Russia, Austria, and Prussia—reveals its contour. The question of intervention in Spain led to the final break. The conflicting issues are stated best by quoting from Metternich's circular dispatch of May 12, 1821: <sup>18</sup> "Useful and necessary changes in the governments of states must emanate from the free will and the enlightened initiative of those whom God has made responsible for power. The Powers will consider void and contrary to the principle of the public law of Europe all pretended reforms brought about by revolution or force." <sup>19</sup> The opposite British viewpoint is revealed in the circular of January 19, 1821, addressed by Castlereagh to the British missions at foreign courts: <sup>20</sup> "It should be clearly understood that no government can be more prepared than the British government is, to uphold the right of any state or states, to interfere, when their own immediate security or essential interests are seriously endangered by the internal transactions of another state. But as they regard the assumption of such right as only to be justified by the strongest necessity, and to be limited and regulated thereby, they cannot admit that this right should receive a general and indiscriminate application to all revolutionary movements without reference to their immediate bearing upon some particular state or states, or to be made prospectively the basis of an alliance. They regard its exercise as an exception to the general principle . . . but they, at the same time, consider that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy or into the institutes of the law of nations." The basic British doctrine of political *laissez faire* appears here in its definitely delineated form.

At this time, prior to the next Conference of Verona, Karl C. A. H. von Kamptz, an otherwise wholly obscure Prussian official, published what appears to be the classic apologia of the practice of intervention in the internal affairs of other states.<sup>21</sup> The book is mentioned here less because of its considerable influence on political thinking of the period and the liberal indignation it provoked, than for its insight into the correlation

of the internal form of government in one state and its repercussions on others. Intervention for the peace and security of the European community, the author declared, is necessary as an international police action against any state whose internal conditions endanger the security of other nations. While insisting on the right of any state to regulate its own affairs as it sees fit, he asserted that the liberal revolution spreading to other states would tend to overthrow the entire system of the established European order. The climax of the controversy was reached at the Conference of Verona, on which the Powers had agreed at Laibach. Spain, Naples, Sardinia, Piedmont, Greece, Southern Germany, and the Spanish colonies in the New World were the fuses of the revolutionary powder keg. The Duke of Wellington was the British representative, acting on instructions drawn up by Castlereagh, then Lord Londonderry, before his suicide (August 12, 1822). They insisted in a language blunt even through the veil of diplomatic courtesy on a "rigid abstinence from any interference in the internal affairs of that country" (meaning Spain). Canning, Castlereagh's successor in the British Foreign Office, in a series of dispatches to Wellington, stressed again and again the strictest nonintervention in the internal affairs of all countries whose status would be discussed at Verona. In the meantime Britain had granted *de facto* recognition to the rebellious colonies of Spain in Latin America. The Verona meeting (opened on October 20, 1822) turned almost exclusively on the Spanish problem. France, anxious to prove herself an equal partner in the European Concert, pressed for intervention by a French army; Alexander wished to use a Russian army, which happened to be strategically located in Piedmont, as instrument of "European" intervention. Wellington, refusing to make Britain a party in any punitive expedition against the Spanish people, took no part in the ensuing discussion. Russia, Austria, and Prussia ordered Spain to modify her constitution; the insurgent government flatly refused to permit other powers to meddle in the internal affairs of Spain. On April 7, 1823, the French army crossed into Spain. The Great Alliance, *alias* the Concert of Europe, *alias*

the Pentarchy, exploded with a crash resounding over Europe. The fuse had been the principle of intervention in the internal affairs of other nations, or, as the Atlantic Charter phrases it, "the right of all peoples to choose the form of government under which they will live." The first great experiment of the union of European powers for the maintenance of peace foundered, as it was bound to founder, on the rock of internal sovereignty which Britain successfully had defended against the dictatorships of both Napoleon and the Holy Alliance. Canning, brusquer than his predecessor though wholly in conformity with his government and with public opinion, expressed it pointedly thus: "So things are getting back to a wholesome state again. Every nation for itself and God for us all. The time for Areopagus, and the like of that, is gone by."<sup>22</sup> No wonder that Metternich fulminated against Canning as "the malevolent meteor hurled by an angry Providence against Europe." But for Europe and the world at large Britain, by denying the right of intervention in the internal affairs of other nations, had established her lasting reputation as the champion of liberalism and liberty, of nations and nationalism, of external and internal self-determination. By no means, however, is Britain's record as the scrupulous respecter of foreign sovereignties unblemished. If demanded by the lusty game of power politics she did not hesitate to interfere with the internal situation of other nations.<sup>23</sup>

#### THE MONROE DOCTRINE

A reverberating echo of the claims of the monarchies to make the world safe for legitimacy came from the New World. The message of President Monroe (December 2, 1823) claimed America for the Americans. It reads in part: <sup>24</sup>

The political system of the allied powers is essentially different . . . from that of America. This difference proceeds from that which exists in their respective governments. . . . We owe it, therefore, to candor . . . to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere, as dangerous to our peace and safety. With the existing colonies or



dependencies of any European power, we have not interfered, and shall not interfere. But with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration, and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling, in any other manner, their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States. . . .

. . . Our policy, in regard to Europe . . . nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers. . . . But, in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent, without endangering our peace and happiness; nor can anyone believe that our Southern Brethren, if left to themselves, would adopt it of their own accord.

It is a result of the dialectics of history that the Monroe Doctrine, intended at first to stave off impositions by Europe on the form of government of the American nations, became suspect at a later date to the very addresses of this protection, as a device for intervention in their internal affairs on the part of the United States. But, with slight deviations to be discussed later,\* indifference to and nonintervention in the internal affairs of other nations has become the guiding star of our foreign policy.

#### THE DOGMA TRIUMPHANT

The triumph of the combined forces of liberalism and nationalism over the territorial and political *status quo* during the nineteenth century was accomplished under the flag of self-determination. If there is any single idea to which the victory could be ascribed it is the doctrine of nonintervention, conceived as the duty of other states not to interfere with the self-assertive dynamics of internal and external autonomy of sovereign peoples. Internally it resulted in making the constitutional form of government, whether monarchical or republican, almost as general in Europe as authoritarian and semifeudal

\* See *infra*, pp. 42 ff.

monarchy had been before. Externally it achieved the establishment of independent nation-states, as the dissolvent of the larger dynastic power concerns held together by tradition and dynastic heritage. But the dogma of nonintervention operated from now on in reverse. While the Grand Alliance had invoked intervention for the sake of defending reactionary governments against rebellious peoples, henceforward the device of nonintervention primarily operated for the benefit of the peoples against their governments. The star of the Holy Alliance was visibly paling, in spite of its renewal at the conference of Teplitz and Münchengrätz of 1833. Russia's intervention in Hungary (1849) at the request of Austria, and France's support of the Pope (1848) against Italian liberalism, were exceptions. In the main, the principle of nonintervention permitted liberalism and nationalism of the awakened middle classes to establish national states as well as constitutional government within them.<sup>25</sup> Slowly though irresistibly the dogma of dynastic legitimacy gave way to the postulate of democratic legitimacy. The first fruits were the emancipation of the Greeks from the control of the Sublime Porte (1827), the creation of the parliamentary, nonlegitimist monarchy in the July revolution in France (1830), the birth of the independent Belgian state under a constitutional monarchy (1831). By the same token were accomplished<sup>26</sup> the unification of Italy, the rise of independent Balkan states from the ruins of the disintegrating Ottoman empire and ultimately the foundation of new national states carved out of Austria-Hungary, Germany, and Russia after the First World War. External self-determination as the natural right of a nation to organize itself as an independent state in the community of nations, and internal self-determination as the right of the people to organize the internal affairs of the state as they saw fit in the light of its traditions and aspirations, were so closely linked that they became indistinguishable, or, to be more precise, that internal autonomy was wholly absorbed by external independence.

It is easy to understand that the dogma of internal self-determination and its corollary, freedom from intervention in

internal affairs on the part of other states, was raised by liberalism and nationalism to the rank of a self-evidential truth. Space forbids even the most cursory account of the maxim's penetration into the leading treatises on the law of nations, to become rapidly an unchallenged and unchallengeable part of it. By the middle of the nineteenth century the doctrine became the stock in trade of practically all commentators on the law of nations, equally accepted in England, France, Germany, and the United States.<sup>26</sup> But in view of the opposite view taken by National Socialist theory and practice it is worthy of note that no other nation defended the theory of nonintervention in internal affairs so insistently as Germany, and that a widely read book by Hermann Rodecker von Rotteck<sup>27</sup> was one of the early outstanding contributions of that country to the subject.

The democratic-liberal Paulskirche likewise believed firmly in it.<sup>28</sup> Nor is it necessary to explain why Italy and Germany as nations which strove for constitutional-democratic government and national unification were even more insistent on internal self-determination than the peoples which enjoyed both. The doctrine of political *laissez faire* was the natural complement of nationalism. Perhaps the most succinct expression of the dogma of political *laissez faire* was formulated by Aristide Briand in 1921: "Le Bolshevisme c'est l'affaire Russe."<sup>29</sup>

The freedom of internal self-determination, as part and parcel of the notion of sovereignty, shared all its attributes of illimitability and absoluteness. No nation can be induced from without to submit to a government it dislikes; nor can a government be compelled to grant liberties to its people. In that superoptimistic period of history the tacit assumption was that liberal constitutionalism in due course would become everywhere the paramount form of government, and that the ultimate beneficiaries of the doctrine of nonintervention would be the peoples, asserting their natural rights against oppressive governments. Neither the learned doctors of law nor public opinion at large in that century, which so strangely believed in progress,

would allow that the historical process one day might reverse itself, giving the benefits of international nonintervention again to despotic governments that enslaved their peoples and invoked the protection of the sacred dogma against interference from without. It was left to the lonely prophets of the coming doom—men like Burckhardt, Nietzsche, Donoso Cortés, Pareto—to visualize the advent of the “terrible simplifiers” who, using democratic rights to destroy democracy, would claim immunity from intervention as an established rule of international law.

Moreover, the dogma of nonintervention was closely linked to the theory and practice of recognizing revolutionary governments, regardless of the methods by which they had seized power, or of the aims they professed and practiced. Again the tacit assumption was that such indiscriminate recognition of any government which *de facto* maintained order, and promised to abide by international obligations of the state it controlled, would ultimately serve democracy and constitutionalism, because most revolutions of the period originated in the rebellion of suppressed peoples against their authoritarian governments. The defenders of the dogma of nonintervention could not foresee that at a not too distant time any government or even military junta which had the airplanes and the tanks could stage a *coup d'état* from above and deprive the people of their birth-right of liberty.

Because this book does not purport to be a legal study, it may suffice to place in the notes quotations from authors representative of the five leading legal civilizations—France, Germany, Switzerland, the United States, and Britain—illustrating the unanimous acceptance which the doctrine of nonintervention in the internal affairs of other nations enjoys.<sup>80</sup> For those who have not satisfied themselves as to the validity of the dogma of nonintervention in the year of grace 1945, the following quotations from “The International Law of the Future,” elaborated by more than one hundred and forty leading American and Canadian lawyers and experts in the law of nations, issued on March 25, 1944, may be convincing:<sup>81</sup>

Principle 3: Each State has a legal duty to refrain from intervention in the internal affairs of any other State.

In the comment it is stated:

Each State is free to determine the nature of its own government, and it is free to develop its own institutions in conformity with the genius of its people. The international law of the future must safeguard this freedom which every State should enjoy. The Atlantic Charter therefore proclaims "the right of all peoples to choose the form of government under which they will live." Yet it is a right to be exercised with due regard for the interests of the Community of States, and each State has a duty to organize its institutions in such a way that it will be in a position to perform its obligations under international law.

While, thus, fulfillment of international obligations apparently is the only limitation of internal self-determination, Principle 2 does not hesitate to place some significant restrictions on the absoluteness of the principle:

Each State has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind.

■ This reservation carefully refrains from any restrictions on the form of government in any state, however abusively the government may treat its population. Its portent will be better understood when the subject of "humanitarian intervention" has been discussed, which the theory of international law does not consider as altogether illegal.\*

#### NONINTERVENTION IN THE PRACTICE OF INTERNATIONAL RELATIONS

How did the postulate of internal sovereignty of all states, large and small, and its corollary, the abstention of other states from intervention, fare in the reality of political dynamics? During the nineteenth century and down to this very day intervention has been practiced so frequently that internal sov-

\* See *infra*, pp. 35 ff.

ereignty must appear an illusion to the naïve observer, a mere hypocrisy to the cynic. A complete list of interventions would necessarily amount to a full-sized political history of the period.<sup>82</sup> Practically all recent wars, the two world conflagrations of our time not excepted, centered on intervention. Intervention was directed by powerful states, acting singly or in groups, against small states or weak states, which were not in a position to defend themselves. Their primary protection was, as a rule, the jealousy of the powers. The reasons for intervention were as varied as the incentives for power politics, in a lawless world dominated by the survival of the fittest. They ranged from stark imperialism and undiluted lust for aggrandizement to the more refined allegations of redress of specific grievances; from the claimed right of self-preservation and the necessity of maintaining the balance of power to the enforcement of capitalistic investments and the protection of foreign creditors. The flagrant malpractice of intervention for financial reasons gave rise to the Drago doctrine, which seeks to exclude it altogether, and the Calvo clause, trying to prevent resort by a foreign national to international protection of his claim arising from a contract without submitting the dispute to the local courts.<sup>83</sup>

Perhaps the most remarkable attempt at intervention with the internal affairs of a great power occurred during the Polish insurrection of 1863 against Russia, when England, France, and Austria, in a collective note, proposed to Russia certain internal reforms which should be examined by a conference of the powers signatory to the Final Act of Vienna of 1815. Gorchakov's answer (July 13, 1863) left no doubt as to the attitude the government of a great power would take when its internal sovereignty was challenged:

Such a meeting relating to the most intimate details of internal administration would constitute a direct interference which a great power could not tolerate since it does not correspond to the letter and the spirit of the treaties concluded.<sup>84</sup>

But it is noteworthy that few if any instances of intervention were based on the incompatibility of a specific form of govern-

ment or internal order with universal standards of political behavior. In practically every single case the motivation was an alleged or real violation of an international obligation by the intervened state, or disadvantages incurred by foreigners for which they were able to mobilize protection by their home state. Outwardly at least, the principle of constitutional autonomy of the individual states was scrupulously safeguarded, although in many cases it was utterly impossible to determine where infringement of external sovereignty ended and interference with internal self-determination began. Whatever may have been the reason adduced or acted on, rarely if ever was intervention based explicitly on the ground of protecting a people against its own oppressive government, except perhaps Napoleon III's support of the Italian *risorgimento*. No distinction was made between a government which violated international law, and its people who might be indifferent or even opposed to that violation. The objective of the intervention was the state as a whole, not the removal of a specific lawless or cruel government. But the dogma of constitutional autonomy and internal self-determination did not prevent Napoleon III, in his ill-starred Mexican venture (1864-1867), from imposing upon a foreign people a form of government, and a government, for which they had no use.<sup>85</sup> Thus the exception confirms the rule, that, even where the internal conditions of an intervened state were a contributory cause of intervention, the form of government as such was always considered to be beyond the pale of international law.

#### NONINTERVENTION AND THE SAN FRANCISCO CHARTER

As could be expected, the San Francisco Charter of the United Nations went on record with an emphatic endorsement of the principle of strict nonintervention in the internal affairs of sovereign states. Says Article 2 (7):

Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present charter;

but this principle shall not prejudice the application of enforcement measures under Chapter VII.

# EXCEPTIONS TO THE DOGMA OF INTERNAL SELF-DETERMINATION

## (1) *Humanitarian Intervention*

Solidly entrenched as is the theory of strict noninterference with internal self-determination, the doctrine of international law almost unanimously agrees that it is subject to an important exception. Intervention in the internal affairs of another state is permissible for the sake of humanity or for humanitarian reasons. More erudite ink has been spilled on this issue than on any other subject in the vast field of nonintervention,<sup>86</sup> and, it may be added, with even fewer tangible results. Stowell, the noted American authority, says in his monograph on intervention:

Humanitarian intervention may be defined as the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to extend the limits of that authority within which the sovereign is presumed to act with reason and justice.<sup>87</sup>

Intervention, or rather the milder form of intercession, is considered legitimate if the state or the government deals with its subjects in such an inhuman and cruel manner as to arouse the indignation of world conscience and the presumed moral solidarity of civilized mankind. The concept has the distinct flavor of the nineteenth century, which claimed to be the century of tolerance and progress. Humanitarian intervention was advocated in cases where a government abused its subjects for religious or racial reasons, or for the prevention of slavery or similar humanitarian motives. Consequently, intercession took place primarily against the Turks on account of their treatment of religious minorities (Christians, particularly Armenians), against the Sultan of Morocco, and against Tsarist Russia because of the treatment of Jews, whereby it should be remembered that Russia acted throughout the centuries as the power protecting the Christians under Ottoman rule. Intervention for



humanitarian reasons did not proceed beyond the stage of more or less discreet diplomatic representations.<sup>38</sup> Moreover, in no case did such humanitarian intercession touch on the cause of abuse—namely, the absence of individual protection under a specific form of government; nor did it question the right of a sovereign state to deal with its subjects as it saw fit. In other words, not even the most revolting violation of the common laws of decency and humanity, committed by a government against its own subjects, was a sufficient ground for other states to criticize officially the political organization which made such outrages possible. Humanitarian intervention, at best, was aimed at symptoms and not at the cause—that is, the despotic or authoritarian form of government which legalized whatever abuses a government perpetrated against its own citizens. Even for humanitarian intervention, the dogma of internal self-determination was taboo. Thus the governments of the great powers after 1917, refusing to remonstrate when Lenin and Trotsky liquidated the bourgeoisie and the counterrevolutionary forces, hid behind the allegation that such an action would be construed as intervention in the internal political system of Russia which recognized terror as a legitimate method of government.<sup>39</sup> That the Allied intervention after 1919 in European Russia and Siberia, in support of the counterrevolution of Yudenitch, Denikin, Wrangel, Kolchak, was motivated by the desire to protect the violated rights of humanity, or to restore the legitimate rule of the Tsar, not even the most ardent advocates of humanitarian intervention would dare to suggest. To the expert in the devious ways of international law it was no surprise that the democratic-constitutional states, so long as they were at peace, never had the courage to protest officially against the Nazi persecution of Jews,<sup>40</sup> Marxists, liberals, pacifists, and other nonconformists, against the “*isole*” of fascism, against Franco and his reign of terror after the conquest of Spain, against the anti-Semitic legislation of the satellite states of the Axis. The more “civilized” the world has become, the more unfeeling it has become toward the postulates of humanity. Humanitarian intervention as a method of international poli-

tics has completely evaporated. Defense of it is merely a harmless pastime of textbook writers. The most that can be said in apology for the callous submission of the world to the shibboleth of internal self-determination is that its demolition would have required a supernational organization or a collective action of the great powers which, with the intricate interplay of power politics and appeasement, was beyond the range of the possible.

However, at this juncture it should be noted that the League of Nations made an attempt to overcome the obstacle of unlimited internal sovereignty by devising machinery for the protection of minorities, perhaps less for the sake of human solidarity than in order to remove some of the most obvious causes of international friction.\* Slowly since the First World War, the realization that internal conditions—political, social, economic—in a particular state are bound to affect the other states in the "community of nations," has gained weight.<sup>41</sup>

## (2) *Constitutional Autonomy and International Law*

Likewise the theory of international law concedes intervention in the internal affairs of other states when based on treaty obligations.<sup>42</sup> Obviously this exception to, or deviation from, the dogma of noninterference with internal sovereignty moves on a level different from that of so-called humanitarian intercession. If a country agrees, by international convention, to adopt a definite form of government, or to undertake certain internal arrangements of a political nature, establishment and maintenance of such institutions becomes a legitimate object of international concern for the treaty partners. Intervention on such grounds is not considered by the theory of international law as being in conflict with the principle of internal self-determination.

Cases of such restrictions through international convention, while by no means frequent, are frequent enough to serve as important precedents—to which the law of nations is so assiduously addicted—for political reconstruction after this

\* See *infra*, p. 53.

war.<sup>43</sup> If the internal constitutional and political order of a state is, thus, raised to the rank of a legitimate objective, of international action under the law of nations, it constitutes a first attempt at breaking down the dominance of the dogma of constitutional autonomy of the independent states.<sup>44</sup> The importance of these precedents for political reconstruction after this war cannot easily be overrated.

(a) **FORM OF GOVERNMENT.** During the nineteenth century a limited number of newly created states accepted the monarchical form of government, by international treaty with the powers which had assisted as midwives in their political birth. At that time the strength of the dynastic idea recommended constitutional monarchy as the proper institutional frame for a new state.<sup>45</sup> Thus, after the liberation from Turkey, the government of the new independent state of Greece was to be monarchical, based on the hereditary right of a dynasty to be chosen and guaranteed by England, France, and Russia.<sup>46</sup> The condition was reenacted between the three courts and Denmark in 1863 when a change of the dynasty occurred.<sup>47</sup> The guarantee was used by England and France in 1916-1917 for removing by intervention the Germanophile King Constantine, brother-in-law of Emperor William II, and to install in his place his second son Alexander. None of the powers, however, felt constrained to intervene in Greece in any of the subsequent changes of regime.\* Likewise the Treaty of Berlin of July 13, 1878<sup>48</sup> (Articles 1-4), creating Bulgaria as an independent state though still under the nominal suzerainty of the Sublime Porte, obligated the principality to adopt a "Christian and monarchical form of government"; the selection of the ruler was subject to the assent of the Porte and of the powers. Other illustrations are Belgium (1831), Rumania (1866), Mexico (1864), Albania (1913); in most cases the country shared more or less perfunctorily in the selection of its ruling house. The undignified haggling, during the First World War, among the German dynasties over phantom crowns

\* See *infra*, pp. 145 ff., 218 ff.

in Eastern Europe (Balticum, Poland, Ukraine) may still be remembered.

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(b) OTHER RESTRICTIONS ON INTERNAL SOVEREIGNTY. To the same category of isolated cases in which specific internal conditions were determined by convention belongs the Treaty of November 20, 1815, between France and the Powers excluding the dynasty of Napoleon permanently from the French throne. However, by 1852 the dogma of nonintervention had so firmly entrenched itself that the powers did not remonstrate against Napoleon III's ascent to the throne, which seemed to conform to the democratic standards of the time in spite of objections of shrewd observers like Walter Bagehot. Similar dynastic limitations were self-imposed without outside pressure in the case of the Third Republic,<sup>49</sup> or enforced by threat of foreign intervention, as in the case of Hungary in 1920 when the right of the Habsburg family to the throne was declared extinct by act of the Hungarian parliament.<sup>50</sup>

Our own experience in the Caribbean area offers some pertinent illustrations. Restrictions on internal self-determination were imposed on Cuba, Panama, and Haiti, and formally covered by treaty so that the resultant right of intervention in their internal affairs placed them under political tutelage without lowering them to the status of protectorates.<sup>51</sup> Such political controls may be explained, though not altogether excused, by our lack of experience in the subtle techniques of imperialism. From a legal viewpoint they may seem to be justified by the interpretation attached at that time to the Monroe Doctrine. But subsequent intervention in the internal affairs of various Caribbean states (Nicaragua 1926-1930, Haiti 1929-30, Dominican Republic 1916-1924) encountered so much resentment among our Latin-American neighbors—who justly complained about dollar diplomacy and the use of our Marines for the protection and collection of capitalistic investments—that a complete change of policy took place, beginning with Hoover's appointment of Dwight Morrow as ambassador to Mexico. The new approach, known under the present admin-

istration as the good-neighbor policy, renounced officially any kind of intervention in the internal affairs of Latin American states under whatever pretext. Our relations with all the countries to the south are now once more governed by the orthodox doctrine of nonintervention in their internal and external affairs. Unequivocal declarations giving full effect to this principle were mutually stipulated in the recent declarations of Montevideo (1933), Buenos Aires (1936), Lima (1938), Rio de Janeiro (1942), and Mexico City (1945).<sup>52</sup>

### (3) *Intervention by Nonrecognition*

A more subtle and not uncommon device for exerting influence on the internal affairs of other states is applied by withholding recognition of a new state or of the new government of an existing state.<sup>53</sup> Recognition is left to the discretion of the individual state even if it is conceded that, in the long run, any *de facto* government if it maintains itself in power, achieves recognition *de jure*. When a new state is recognized, fulfillment of certain conditions of the internal arrangement may well be imposed, as in the cases of Serbia, Bulgaria, Montenegro, and Rumania, created by the Treaty of Berlin (1878) which were enjoined not to discriminate against religious minorities.<sup>54</sup> Numerous similar obligations implying deep inroads into internal autonomy were imposed on the nations defeated in the First World War by the suburban treaties of Paris in 1919. Of relevance to this discussion is primarily the case that a government accedes to power by nonconstitutional methods which may, or may not, be violent or tantamount to a *coup d'état*. The issue, frequent in the political dynamics of a restless period, reveals a wide cleavage between the doctrinal assumption of internal self-determination and the actual state practice. The theory frowns upon the refusal by a state to recognize a government for reasons of its own, as violation of the principle of internal autonomy.<sup>55</sup> However, while the nineteenth century at least had the courage openly and consistently to express its belief in the paramount validity of a specific form of government—the Holy Alliance endorsing authoritarian and

legitimist monarchy, liberalism striving for a constitutional monarchy—a corresponding belief in our time in the need for the democratic-constitutional state or for political democracy is conspicuous by its absence. The theory, again with near-unanimity, condemns nonrecognition of a new government as a device for compelling a people to support an existing legitimate government or to submit to a revolutionary government.<sup>56</sup> Recognition, it is held, should be indifferent to, and independent from, considerations of the internal organization a nation may deem fit to adopt for itself. The dogma of internal self-determination demands that any government, whatever its political complexion or the manner in which it seized control, has a claim to recognition if it is able to maintain itself and willing to abide by the international obligations of its state. Contrariwise, in the international practice of previous times the internal form of government was the real motive for granting or withholding recognition although basic disagreement with the internal political order of another state was rarely if ever the officially admitted cause. While monarchical France in 1778 recognized the revolutionary American states, which were republican, England in 1792 refused to recognize the revolutionary government of the Convention, because she was opposed to France's internal political organization. England denied recognition (1903–1906) to the Karageorgevich dynasty as rulers of Serbia after the massacre of the rivaling royal family. In our time Soviet Russia was not recognized *de jure* by England until February 1, 1924, or by this country until November, 1933. Even today some states refuse to recognize Soviet Russia or to entertain diplomatic relations with her: allegedly, because of repudiation of international obligations or Soviet subversive propaganda abroad; actually, because they disagree with the political and social implications of the Soviet system. The long-suffering Soviets were biding their time. By now they are powerful enough to turn the tables on those states which are using nonrecognition as a legitimate method of condemning the Russian system of government and society. In November, 1944, the Kremlin rejected, with a blunt-

ness rare in diplomatic history, the plea of the Swiss government to renew the diplomatic relations which had been broken for more than a quarter of a century. At the same time Russia refused to sit at the same table in the Civil Aviation Conference at Chicago with the representatives of Switzerland, Spain, and Portugal, or in the International Economic Conference with a Brazilian delegate—all these governments at that time violently anticommunist in their internal politics. Nonrecognition, thus, cuts both ways and, if used by a powerful state, may well become a means in reverse of intervention with the domestic affairs of other states.

The United States, with the single deviation under Wilson's presidency to be discussed presently, persistently adhered to the policy inaugurated by Jefferson of recognizing every government irrespective of the legitimacy of its origin. The so-called Stimson Doctrine<sup>57</sup> does not refer to the internal form of government, because it denies recognition only of territorial changes brought about by force and in violation of international law. It leaves wholly untouched the problem of revolutionary changes occurring within a state through force and violence or otherwise unconstitutional means. However, a significant departure from the policy of indiscriminate recognition is found in the so-called Wilson Doctrine.<sup>58</sup> In his inaugural address of 1913 Wilson declared that the United States would not support any Latin-American government that came to power by revolutionary means, thus endorsing the doctrine announced in 1907 by the Ecuadorian diplomat and jurist Tobar.<sup>59</sup> In conformity with his concepts of constitutional legitimacy, Wilson refused to recognize Huerta's dictatorship in Mexico in 1913.<sup>60</sup> A similar case occurred in 1917 in Costa Rica.<sup>61</sup> The accent on constitutional legitimacy underlying the doctrine is another significant proof of Wilson's vision and discernment even though in practice the policy was short-lived and ineffective.

The awareness that not only the internal form of government is relevant internationally but, in addition, homogeneity of internal political systems is conducive to international peace

and understanding—a novel idea though postulated with utmost clarity by Kant\*—blossomed forth in the Treaty of Washington of February 7, 1923, concluded<sup>a</sup> between the five Central American republics.<sup>62</sup> It stipulated, in conformity with a previous treaty between the same partners of December 20, 1907,<sup>63</sup> that revolutionary governments would not be recognized by the treaty signatories (Article 1).<sup>64</sup> In addition the treaty enjoined on the partners that their internal constitutions should see to it that dictatorial coups were made impossible or at least more difficult. Reelection of a president in power (the customary Latin-American method of establishing a dictatorship) should be prohibited by appropriate provisions inserted into the constitutions (Article 5). No revolutionary government would be recognized until the parliament, on the basis of a free election, had had an opportunity to reorganize the country in line with constitutional procedures. Even so, no person was to be recognized as chief of state, president or vice president who was a leader of the revolution or was allied with it, or was a close relative of such a leader, or had occupied a higher civilian or military office at the time of the coup or of the election or within six months before either event (Article 2). In most Latin-American constitutions the principle of nonreelection is stipulated;<sup>65</sup> but few hold it sacred, the customary device for perpetuating a president beyond his legal term being an amendment to the constitution passed by a corrupted Congress, or an open violation of the constitution as in Brazil under Vargas.<sup>66</sup> It should be noted, however, that a democratic-constitutional form of government as mandatory requisite of recognition is utterly impossible in a region politically so volcanic as Central America, where a coup by a revolutionary junta is the time-honored substitute for an otherwise fraudulent election, without an assumption by the United States of the arduous task of permanently policing elections.<sup>67</sup> Costa Rica in 1932 and Guatemala in 1933 denounced the treaty. Under the Good Neighbor policy the Wilson Doctrine would be considered as being at variance with the solemn dec-

\* See *supra*, pp. 17 ff.



larations of nonintervention in the internal and external affairs governing the relations within the Western hemisphere under recent agreements.\* <sup>68</sup>

However, the inescapable nexus between the internal form of government and recognition, which Woodrow Wilson had so clearly visualized, once more became evident when, on December 20, 1943, the government of Bolivia was seized, through a *coup d'état*, by a revolutionary junta which gave strong indications of Axis leanings and the support of pro-Axis forces inside and outside the country. All American republics except Argentina and Paraguay—the latter in recent years almost a satellite of the former—withheld recognition after consultation. The action which led to this solidary attitude toward a government installed by force is noteworthy because of the procedure behind it. The measure was initiated by the Emergency Advisory Committee for Political Defense in Montevideo, which the Third Meeting of the Foreign Ministers of the American republics had established at the Rio de Janeiro Conference of 1942 as the general staff of the Pan American community of states to combat political warfare of the Axis in this hemisphere.† The Committee issued, on December 24, 1943, its Resolution XXII to the effect that, while the present emergency lasted, the American governments should consult among themselves whenever a government came to power by force in an American state, in order to determine, in the light of that government's compliance with the Pan American undertakings for the defense of the continent, whether it should be granted recognition.<sup>69</sup> Resolution XXIII of the Committee, issued on January 5, 1944,<sup>70</sup> applied this general policy of non-recognition to the special case of Bolivia. After consultation the American states, acting individually, denied recognition. Subsequently, in June, 1944, the ban on Bolivia was lifted, perhaps prematurely, after the revolutionary government had offered what at that time appeared to be proof of its anti-

\* See *supra*, p. 40.

† For further details on the activities of the Montevideo Committee, see *infra*, pp. 81 ff.

Axis attitude, by purging itself from some of its pro-totalitarian elements, cutting affiliations with pro-Axis groups and enacting additional measures required by the Committee's resolutions for the defense of the continent against political machinations of the Axis.

The departure from the traditional policy of indiscriminate recognition of revolutionary governments, regardless of origin and political complexion, is momentous enough to give the Montevideo Committee a prominent place in the development of international law. It implies nothing less than that the existence of a totalitarian regime in any American state is a matter of deep concern to all American states, since it would affect the security of all states in the western hemisphere. The importance of the new policy is not minimized by its explicit limitation to the duration of the present world conflict. But the Bolivian case was only a prelude, more important in principle than in substance. The real test came in March, 1944, when Resolution XXII was used to strike squarely at the revolutionary and unconstitutional government of President Edelmiro Farrell of Argentina. Again the vast majority of the American states (only Paraguay, Bolivia, and Chile excluded themselves), after consultation, concluded that the government of Argentina did not deserve recognition. While officially the measure was justified by the Argentine government's disloyalty to the principles of Pan American defense and noncompliance with obligations undertaken by all American republics in the Rio de Janeiro Conference, there can be little doubt that the intrinsic reason for nonrecognition was the fascist character of the regime. In the United States, and in some other American republics, public opinion was for once properly alerted, and was utterly disinclined to tolerate the entrance of fascism into the back yard of the continent, by invitation of the colonels' clique, while it was bending all strength to crush the totalitarian system abroad.

In its official declarations the committee took great pains—as was only to be expected in view of its composition and its at times politically rather precarious position—to emphasize

that neither the procedure applied nor the policy adopted constituted a deviation from the principles of international<sup>6</sup> law. Authentically interpreting its action in the second annual report, the committee declared:<sup>71</sup>

Therefore it is evident that the application of the procedure [consultation prior to recognizing a revolutionary government] does not affect the principle of nonintervention in the internal affairs of a sovereign state. The consultations do not refer to considerations concerning the internal politics or the constitutional order of a definite state, nor do they conceal the intention to abridge in any way the right of the people to choose their government by means which they determine themselves.

Yet the committee realized—herein lies the importance of the issue—that the foreign policy of a state is predicated on its form of government, that they are merely the two sides of one and the same coin, intrinsically interdependent and conditioning each other. On the other hand, the Latin-American governments were deeply conscious—and understandably suspicious—that the policy of collective nonrecognition may be turned, after the present emergency has passed, into the weapon of collective intervention with the internal form of government. The governments of Mexico, Paraguay, the Dominican Republic, and Uruguay accepted Resolution XXII with corresponding reservations concerning the maintenance of internal sovereignty.<sup>72</sup> Characteristic is the answer of the Uruguayan Minister of Foreign Affairs, which reads in parts:<sup>73</sup>

However, in spite of the adhesion expressed, the Government of the Republic wishes to make it perfectly clear that it would not for a moment admit that the thesis contained in the Recommendation acquires the character of an American doctrine of the law of nations. Both as a doctrine and as a proposition with aspirations to more permanence than the most strict limitation the text of said Recommendation has assigned to it, it would be susceptible to all the criticism which, at their time, have aroused the legitimist-monarchical interventionism of the Holy Alliance and the democratic-legitimist interventionism of the Tobar Doctrine, both expurgated from the continental law by the Argentine Antiwar Pact, the Convention on Fundamental Rights and Duties of States, and the Protocol of Buenos Aires of 1936.

In general there can be little doubt that nonrecognition of a dictatorial government is an effective weapon only if accompanied and fortified by sanctions, moral, economic, and other. At first it appeared that the clique of the colonels in Buenos Aires could well afford to ignore the pinpricks of diplomacy as long as it had the power to stabilize itself against adverse public opinion at home. It should be borne in mind that, in the light of human experience, a people which is prosperous—Argentina is the foremost war profiteer among the neutral nations in this world conflagration—does not much care about the form of government or the nature of the regime it lives under. In addition, the fear of the "Colossus of the North" and of intervention on its part has assumed in Argentina, forever claiming its leadership of Latin America, the proportions of a national obsession—an obsession strengthened by Sumner Welles's unfortunate attacks on President Roosevelt's policy toward Argentina. However, in our time world opinion is a factor which no nation—not even one which is so roundly self-sufficient as Argentina—may lightly ignore. The group of rank political amateurs and adventurers who, at a time when the United Nations were about to eradicate European fascism, succeeded in subjecting a proud and profoundly democratic people to an ignominious regime, felt ill at ease under the nonrecognition which, if continued into the postwar period, might bar Argentina from her legitimate place in the economic reconstruction of the world. Therefore, in November, 1944, the Farrell government made a deliberate move to extricate itself from Pan American excommunication by requesting, through the Pan American Union, a new consultative meeting of the foreign ministers of the American republics, in order to free itself from the suspicion of connivance with the Axis and, thus, to gain recognition. What is important for the purposes of our discussion is the naïve demand of the Argentine rulers that the internal aspects of the regime must be excluded from discussion at the forthcoming meeting—as if it were possible, in our time, to separate the issues of foreign policy of any country from its form of government.

The ultimate solution of the Argentine question resulted in an anticlimax. Resolution LIX of the Final Act (March 8, 1945) of the Inter-American Conference on Problems of War and Peace, held at Mexico City, opened a convenient door through which Argentina, represented by a government without popular mandate and unpopular, could slip into the camp of the United Nations. It permitted Argentina to adhere formally to the Act of Chapultepec and the other resolutions of the Conference. The "implementation of a policy of cooperative action with the American Nations," as "hoped for" by the Conference (Resolution LIX, No. 5), consisted merely in the declaration of war against Germany and Japan (March 30, 1945) and the adoption, to date mostly limited to paper, of some other measures required by common continental defense, while no further questions were asked as to the loudly announced democratization of the internal regime and the adherence to the principles of the rule of law and human decency. Recognition was granted early in April by governments of the United States and the other Latin American countries, giving thereby the green light for the perpetuation of a pungently fascist regime in the Western hemisphere.

This opportunistic relapse on the eve of the San Francisco Conference into the traditional indifference toward the form of government of other nations—even though inconsistent as a policy with the ideals and tenets for which the Second World War has been fought—is deeply regretted by many who feel that a great opportunity for promoting international security has been missed. In their judgment continued collective pressure of world opinion, symbolized by nonrecognition, would sooner or later have induced the militarists in Buenos Aires to yield to democratic legitimacy. But the Argentine incident has at least served a useful purpose. It focused public attention on the fact—which by now has become inescapable—that the internal organization of a state determines its attitude toward other states and its standing in international relations. The form of government of any and every state has become the concern of any and all states in the international community.

### CHAPTER III

## *Internal Form of Government and the League of Nations*

#### ADMISSION TO MEMBERSHIP AND FORM OF GOVERNMENT

The framers of the League of Nations were so engrossed in the idea of external self-determination under which every nation had the right to become an independent state, that they fatefully overlooked the crucial causality which exists between the internal freedom of a people and the ideal of a peaceful brotherhood of sovereign nations. The triumph of the nation-state so overshadowed all the other issues that revision and reappraisal of the dogma of political *laissez faire* never were placed on the agenda. In retrospect one may well wonder at such unrealistic blindness; but one must remember that Wilson's political esoterics, unmitigated by the skepticism of the historian, at no time conceived any other possibility than that a people freed from autocratic rule and from foreign control would, by a sort of primitive automatism, embrace constitutionalism and would never, never depart therefrom. External self-determination was the leitmotiv of the Fourteen Points and other proclamations *ex cathedra*.<sup>1</sup> Internal self-determination is only occasionally, and vaguely, alluded to.<sup>2</sup> "Freedom exists only where the people take care of their government," he had proclaimed as early as 1912. To Paris in 1919 and later to Geneva, the truth was self-evident that a people liberated from foreign domination must turn to political democracy. Wilson's belief in the innate urge of a liberated people to choose democracy and no other form of government seemed fully justified by the actual experience after 1918. All victorious nations

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See pp. 417-424 for footnotes to this chapter.

were political democracies or at least constitutional states; and the liberated nations threw themselves almost frantically into democratic constitutions—Germany, after the Kaiser had been removed,<sup>3</sup> no less than the newly emerging states. At long last the springtime of political democracy seemed to have come, and nobody believed that it was an all-too-brief Indian summer. Russia, since 1917 a barbarian dictatorship, was regretfully disregarded.

In conformity with the traditional dogma of political *laissez faire* the Covenant of the League minimized the issue of internal self-determination to the point of a mere formality in the process of admission to membership. Article 1 granted membership to "any fully self-governing State, Dominion or Colony"—not belonging to the group of original members of the League—provided that the applying state gave guarantees of its intention to abide by international obligations and accepted conditions prescribed by the League concerning its military forces and armaments. But the clause "fully self-governing" referred only to the control by a government of the internal affairs and the foreign relations of its state, and in no wise to what in common parlance would be called "self-rule"—implying an internally free (democratic-constitutional) form of government.<sup>4</sup> The French text, "*qui se gouverne librement*," is somewhat more specific. In the original French proposal the requirement of a "constitutional," instead of a merely "constituted," government was much more definitely stated than the finally accepted equivocal formula.<sup>5</sup> Whatever may have been the originally underlying intention, the fact remains that the test of being a "fully self-governing" state was applied, in League practice, only to a country's international independence: toward its form of government the League was utterly indifferent. Siam, one of the original members of the League, was at that time an oriental monarchy of the most absolute type imaginable, not tainted by any constitutional limitations. In admitting new members only the formal requirements of the Covenant were insisted upon.<sup>6</sup> At no time did the absence of constitutional government prove an obstacle to admission—

not even in the case of Ethiopia which, at best an absolute monarchy, was actually a medieval robber state;<sup>7</sup> nor, in the case of admitted members, did a change from a constitutional to a nonconstitutional form of government lead to remonstrations by the League, let alone to exclusion. Once a country was admitted, no questions were asked, because this would have been inconsistent with the basic assumptions of the League organization; namely, equality and independence of the members. In addition to the original members, twenty states were subsequently admitted. None of seven additional territorial entities that sought admission and were rejected failed for reasons of internal political organization. An exception was Turkey, which was requested to provide for a proper election law; but it may be disregarded here because the Turks cleverly side-stepped the issue. Hungary was admitted in 1922 only after outlawing, by legislation, the restoration of the Habsburg dynasty to the vacant Hungarian throne. Although the formal basis of this condition was the duty of the applying state to fulfill its international obligations, the requirement amounted substantially to an intervention in internal constitutional autonomy.<sup>8</sup> Likewise Article 10 of the Covenant, the "cornerstone" of the Geneva system in Wilson's opinion, when establishing the mutual guarantee by the League members of their "territorial integrity and existing political independence" against aggression, applied only to the external situation of the member states and was not intended to guarantee, stabilize, or freeze their internal condition.<sup>9</sup> Reference should be made in this connection also to another limitation upon the jurisdiction of the League: Under Article 15, Section 8, of the Covenant, "a dispute arising out of a matter which by international law is *wholly within the domestic jurisdiction* of that party" is excluded from compulsory arbitration and judicialization before the Permanent Court of International Justice. So the Covenant exempted from international action all controversies bearing on the internal affairs of any member, even if other countries were affected—as in matters of immigration, nationality, customs, and tariff.<sup>10</sup> This vital restriction of in-



ternational jurisdiction was dictated by the respect the Covenant paid to internal self-determination.

At the beginning of the Geneva system, virtually all original and all admitted members of the League were constitutional states if not political democracies; but in 1934, when Russia became a member, the situation had changed almost beyond recognition. The League now contained outright dictatorships. (Italy, Turkey, Yugoslavia, Russia) and authoritarian states (the three Baltic states, Hungary, Austria, Poland, and Bulgaria), not to mention the numerous dictatorships in Latin America, in which democratic-representative institutions either were wholly absent or were substantially perverted. The League was headed for the world catastrophe under the flag of the dogma of political *laissez faire*. It must be conceded to Hitler that he at least was sincere when he took Germany out of the League by a plebiscite in November, 1933, fully realizing that his dictatorship with its implied aims of conquest did not fit into the League frame. But the League itself had no legal right and no intention to exclude Germany or any other state because of its form of government. And where could the line have been drawn if a state, in spite of ample evidence to the contrary, claimed to be a democracy? Who was to bell the cat? How could the League, aspiring at universality, stoop so low as to squabble about technicalities of internal organization? If League membership had been confined to constitutional states, Geneva would have been an institution frequented by a very restricted clientele indeed.

#### DEVIATIONS FROM INTERNAL SELF-DETERMINATION UNDER THE LEAGUE OF NATIONS

In the atmosphere of public disparagement and scorn to which the Geneva system is currently exposed, it requires a considerable intellectual effort to realize that the League of Nations, despite its fascination by the traditional dogma of unimpaired internal self-determination, deviated from the rigidity of the maxim in a number of cases whose didactic and precedential values for the future can hardly be overestimated.

## PEACE TREATIES

In the first place, various and incisive limits on internal self-determination were imposed upon the nations defeated in 1918 by the Versailles and suburban peace treaties.<sup>11</sup> It is the way of peace treaties to subject the vanquished who lose a war to territorial losses and to economic and moral disadvantages. From the viewpoint of the defeated, a peace treaty is necessarily always a *Diktat*. The singular feature of the case after 1919 was that the German genius for self-commiseration infected public opinion in the victorious states to such an extent that it helped the nonfulfillment policy of the Weimar republic to whittle away the treaties piecemeal by negotiations and concessions until Hitler swept away the remainder by force. Restrictions of the peace treaties on internal sovereignty pertained to the military establishment, to matters of economic, financial, and foreign policy. They were duly accepted by Germany as binding provisions of her internal constitutional law. The Weimar constitution itself explicitly stipulated that "the provisions of the Treaty of Peace signed at Versailles on June 28, 1919, are unaffected by the constitution" (Article 178, section 2, sentence 2).<sup>12</sup> However, Versailles limited the constitutional autonomy of Germany and Austria only by prohibiting the political incorporation of Austria into Germany (*Anschluss*);<sup>13</sup> and this was a curb more on external than on internal self-determination, particularly from the Austrian standpoint. Otherwise Versailles applied to the defeated the policy of "Live and let live." Internally they could do as they pleased. If the Germans had so desired they could have retained the monarchy. Nor did Versailles offer any device for preventing the rise of virulent and aggressive nationalism. The Hitler movement was considered as a purely German affair although it rode into power on the promise to free Germany from the "shackles of Versailles." From its inception the Hitler regime constituted by its internal organization a menace to world peace which even the most infatuated among Germany's admirers should have recognized.

## MINORITY PROTECTION UNDER THE LEAGUE

In the second place—and therein lies a momentous innovation—the fathers of the League realized that specific political conditions within a particular state or several states are bound to affect other states and, therefore, become the legitimate concern of the community of nations. On this ground the League assumed the right to organize under its auspices the protection of ethnical minorities. The intermixture of different nationalities in various states in Central and Eastern Europe had become so explosive, particularly since territorial changes had taken place in conflict with the principle of external self-determination, that the League did not allow the dogma of internal autonomy to stand in the way of a preventive regulation by which potential conflicts between ethnical consciousness and national jurisdictions could be avoided and internationally adjusted. Systematically and ideologically these minority regulations belong to the domain of humanitarian intervention. "States have in their own interests become their brothers' keepers. If physical and moral disease is rampant across the frontier, it is almost impossible to prevent it from infecting one's own country." <sup>14</sup> Beyond this the minority protection may well be considered as the rudimentary beginnings of a more ambitious scheme to protect everywhere, at home and abroad, the rights of mankind. The portent for the future of this new approach is not minimized by the realization that mutual guarantees for the treatment of minorities were based on eminently practical grounds, not least among them the fear of reprisals.

Of the vast complex of the minority protection system of the League, only such points are of relevance here as pertain to the restriction of internal sovereignty for the sake of peace and international order.<sup>15</sup> Obligations concerning ethnical minorities were assumed in 1919 and later in different ways: through the peace treaties themselves (by Austria, Bulgaria, Hungary, and Turkey);<sup>16</sup> by treaties between the Allied and associated Powers and certain states belonging to the camp of

the victorious nations (Poland, Czechoslovakia, the Serb-Croat-Slovene State, Rumania, Greece) in 1919 and 1920; through unilateral declarations by states as a prerequisite to their entrance into the League (Albania, Estonia, Finland, Lithuania, Latvia, Irak) which were considered as of equal value with formal treaties. Similar treaties were concluded also with Danzig and Memel. Germany alone was not requested to accept such restrictions on her internal autonomy; however, a corresponding provision concerning the protection of "parts of the population not speaking the German language" was inserted into the Weimar constitution (Article 113); it was vague enough to be inapplicable without further legislative specification, which was never undertaken. Finally, in the early years after the last war, numerous special conventions were concluded between neighboring states.<sup>17</sup>

We are not concerned here with the content of these treaties except to note that the minority protection, in spite of local variations, was more or less uniform: to the inhabitants generally they granted life, liberty, protection in the free exercise of religion without discrimination, and just facilities for the acquisition of nationality; to nationals regardless of ethnical antecedents, equality before the law in all political and personal matters, including the use of their own language. Minority protection included further freedom of organization for religious and educational purposes, and minimum educational facilities for foreign minorities forming a considerable proportion of the national population. But of relevance here are the two interlocking methods by which enforcement was attempted. The first was incorporation of the protective measures into the national constitution.<sup>18</sup> All minority treaties and most minority declarations contained a clause to the effect that "no law, regulation, or official action shall conflict or interfere with these stipulations, nor shall any law, regulation, or official action prevail over them." But the subordination of the state accepting such restrictions on its internal constitutional autonomy went even farther in that the state submitted to international supervising of the exercise of its amending powers

with regard to the minority-protecting provisions. The treaty of June 28, 1919, between Poland and the powers, which subsequently served as a model for similar treaties with other states, explicitly stated (Article 12) that the apposite provisions of the Polish constitution should not be changed without the authorization of the majority of the Council of the League, that every member of the Council had the right to call to the attention of the Council any infraction or any danger of such infraction of the international obligations, and that the Council might take such steps as seemed appropriate under such circumstances.<sup>19</sup> Controversies over the minority protection between the Polish government and any other power represented on the Council were to be submitted to the Permanent Court of International Justice at the Hague. Thus, under the Geneva system the protection of minorities received the double guarantee of the municipal constitutional law and the international supervision of the League. However, theory and practice agreed that the enforcement of the minority protection by the municipal courts could not be derived automatically from international obligations of the state, and depended on their previous legislative translation into municipal law.<sup>20</sup> Judicial protection, therefore, was utterly defective unless the state had implemented its international obligations by corresponding internal legislation. Even so, the courts were inordinately reluctant to grant the minorities their rights under the existing municipal law; and the procedure evolved by the League for bringing to its notice minority petitions, for the redress of grievances—by various devices of the Council, the Assembly, the minorities Commissions, and the Minority Section of the Secretariat—was no more effective. Both the letter and the spirit of the minority protection were violated by legislative discrimination, administrative sabotage, and even by criminal prosecution of persons invoking the international guarantees against their own government.

The most ardent supporter of the Geneva system would hardly declare its minority protection a success. Much as the peace treaties contributed to simplifying the tangled minority

situation, particularly in Eastern Europe, even a superhuman fairness in redrawing the map was bound to leave on the wrong side of the political borders minorities which looked toward foreign governments for redemption. In due course they developed a divided loyalty and became ideal material for a potential Fifth Column. Unsatisfactory as is the record of the minority solution attempted by the League, it would be erroneous to ascribe it exclusively to the inherent defects of the technique of protection. The principle of minority protection was sound enough. The League cannot be made responsible for the intransigence of nationalism in a period whose religion is nationalism. There is, however, one cardinal point which is generally and characteristically overlooked; namely, that the minority treaties worked well as long as the states operating them were devoted internally to the principles and techniques of political democracy. The treatment of a minority closely corresponds to the treatment of the people as a whole by its government; and disregard of the rights of minorities was usually the harbinger of inroads into constitutional guarantees in general. The decline of the democratic ideology in Europe is closely reflected in the increasing ineffectiveness of the minority protection. Democratic nations have by far the better record. Authoritarian states or dictatorships which trampled on the rights of their own citizens could not be expected to be gentle with their foreign minorities. The records of the Weimar republic and the Baltic states are good enough. Those of Austria and particularly of Czechoslovakia are excellent, while Poland, Rumania, Greece, and Hungary were the worst offenders. Once more one discovers the truism that the internal form of government determines the relations of the country to other states.<sup>21</sup> Human rights cannot be disassociated from human government. However little as the minority regulations by the League may have accomplished in practice, they set the pattern for possible restrictions on the internal autonomy of states in the period of reconstruction after this war. What has been undertaken toward protecting ethnical minorities in a segment of their essential human rights, may as well be at-

tempted at a later date toward protecting political minorities internationally and constitutionally in the totality of their human rights. The experience with the minority protection under the League should not unduly discourage the attempt to extend it to other constitutional provisions placed under the guarantee—which, to be sure, has to be more effective—of an international organization. As a precedent for limiting, by treaty or by unilateral imposition, the constitutional autonomy of states for the sake of international peace and order, the abortive system of minority protection under the League deserves careful study.

#### THE EXPERIMENTS WITH POLITICAL TUTELAGE UNDER THE LEAGUE

For identical reasons, another melancholy chapter in the League's experiments cannot be omitted here. The attempt to implant a constitutional-democratic regime in certain territories and to place its maintenance under international guardianship was carried out in the basin of the Saar, in the Memel territory, and in the Free City of Danzig.<sup>22</sup> In all three cases the international protection of the constitutional form of government was immolated to power politics and nationalism, to appeasement and indifference of world opinion.

##### (a) *The Territory of the Saar* <sup>23</sup>

In the Versailles Treaty (Articles 45-49) Germany renounced "in favor of the League of Nations, in the capacity of trustee, the government of the territory." The trusteeship of the League was exercised through a Governing Commission of five members appointed by the Council of the League, responsible to the League, and aided by representatives elected by the inhabitants. Of its members, one was a French national, one a resident of the territory; the three others were not to be nationals of either Germany or France. The Governing Commission had legislative, administrative, and executive functions including the right of appointment of officials. The Saarlanders retained their German nationality. In practice the internal administration of the territory (which is a

more appropriate term than government) involved no particular difficulties. But this favorable record of the League's trusteeship can be properly evaluated only if two essential facts are well realized: French and German heavy industry, the real masters of the territory, found it expedient in the common interest to cooperate, and the regime was temporary only, to be terminated by a plebiscite after fifteen years. The plebiscite was the first on record which permitted a choice by the populations among three alternatives; namely, whether to continue the international regime, to join France, or to join Germany. Held on January 10, 1935, it resulted in an overwhelming majority for the return to Germany. The outcome was all the more surprising since the electorate previously had shown strong preference for the Catholic party and the Social Democrats, both opposed to the Nazi regime. There is no other example of a people, under free and unfettered, internationally supervised elections, joining voluntarily a dictatorial state. But it must be borne in mind that factually no alternative existed. The League had no interest in continuing indefinitely the administration of the territory; the population, wholly German, was utterly disinclined to align itself permanently with France; in addition the subtle and deadly effective propaganda of intimidation, exercised by the Third Reich and the National Socialist party before and during the election campaign, demonstrated that not even the most perfect arrangement of technical controls to guarantee an honest vote, can overcome or neutralize invisible election terror. In view of the special conditions in the territory, the relative success of international government is of little significance.

(b) *Memel* <sup>24</sup>

The Treaty of Versailles (Article 99) conferred the right to organize the Memel territory on the Allied and associated Powers. In 1923 Lithuania seized Memel by *coup d'état*. The subsequent Treaty of Paris of May 8, 1924, between Lithuania and Great Britain, France, Italy, and Japan,<sup>25</sup> while confirming Lithuanian sovereignty, granted the district internal autonomy



and placed its exercise under international control and guarantee. The territory was to constitute "a unit organized in line with democratic principles and enjoying legislative, judicial, administrative, and financial autonomy within the limits of the Statute" attached to the treaty. The government (Directory) was to be subject to parliamentary control of the Chamber of Representatives, elected by universal, equal, direct, and secret suffrage (Articles 10, 17). Amendments to the Statute were subject to acceptance by qualified majorities of the Diet and the electorate, and likewise to ratification of the Lithuanian parliament (Article 38). When subsequently, in 1926, Lithuania became a dictatorship and equipped herself with an authoritarian constitution (1928), the democratic regime of Memel at first was continued. In time, however, it was bound to be coordinated to the form of government prevailing in Lithuania proper. Within its orbit, be it spatially large or small, a dictatorship cannot tolerate a political organization of divergent nature. This holds true for the relationship of the dictatorship with communal institutions as well as with political entities within its *Befehlsraum*. The Memel diet was dissolved by the Lithuanian governor of the territory (March 22, 1932). The signatories of the treaty thereupon peremptorily demanded that the Lithuanian government maintain within the territory electoral institutions and constitutional guarantees. However, the Permanent Court of International Justice, invoked to interpret the Memel Statute, decided substantially in favor of Lithuania,<sup>26</sup> guided as much by the erroneous conception of the principles of the parliamentary system as by the obvious impotence of the League of Nations to enforce the continuation of the democratic system in Memel without effective methods of constraint against Lithuania. Germany, having turned dictatorial in 1933, had no interest in the maintenance of a regime so diametrically opposed to its own and did not object to Lithuania's abrogation of democratic institutions in Memel. Although the Memel territory owed its existence as a constitutionally governed state to a creative act of an international organization, the dogma of

political *laissez faire* was so deep-rooted that the League could not persuade itself to intervene on behalf of the maintenance of political democracy.

(c) *Danzig*

The case of the Free City of Danzig and its submergence by the totalitarian flood deserves a somewhat more elaborate treatment here.<sup>27</sup> The creation of Danzig together with the surrounding territory as a Free City was due to Wilson's Thirteen Points, that Poland should be given free access to the sea. Ever since, by the third partition of Poland (1795), the "Queen of the Baltic" had been annexed to Prussia, the population had been thoroughly Germanized; and it was intensely loyal to the fatherland. Incorporation into Poland was deemed undesirable. The Treaty of Versailles (Articles 100–108) established the territory as a "Free City" "under the protection of the League of Nations" (Article 102). In addition, it was stipulated (Article 103) that "a constitution shall be drawn up by the duly appointed representatives of the Free City in agreement with a High Commissioner appointed by the League of Nations. This constitution shall be placed under the guarantee of the League of Nations." It will be noted that, thus, the Free City as such was under the "protection" of the League while the constitution was given the League's "guarantee."<sup>28</sup> The type of territorial entity constituted thereby was an anomaly or, more precisely, an innovation in international law; but it is justifiable to classify Danzig as a protectorate of the League of Nations, despite the fact that the conduct of foreign relations and the protection of the citizens abroad was entrusted (by treaty of November 9, 1920) to Poland.

The guarantee unilaterally assumed by the League carried the obligation to protect the constitution as approved by it against violation.<sup>29</sup> Danzig's internal autonomy—this is the essential point—was limited by the discretion of the League, and its exercise was subject to the League's approval. The High Commissioner's functions (Article 103, section 2) were

in the first instance to deal with all differences between Poland and Danzig arising under the Versailles Treaty and subsequent special arrangements between them. In addition he was charged to submit to the League the draft of the constitution elaborated by the representatives of the Free City. He has been aptly described as the "watchdog of the League";<sup>80</sup> but he had no power of his own to decide issues concerning the internal autonomy of Danzig, and the complaints submitted to him, he transmitted as informational material to the League. This is important because subsequently the High Commissioner was accused of neglect of duties when he remained passive in internal controversies. On the whole, though with some notable exceptions, capable men filled the difficult office of High Commissioner.

The National Assembly of Danzig, elected on May 16, 1920, adopted on August 11 a constitution which followed the Weimar constitution in the main but was also inspired by the precedent of the Hanseatic City of Lübeck. Sir Reginald Tower, Provisional High Commissioner (appointed February 20, 1920), did not participate in the drafting; but the League was represented at the debates by an observer. In conformity with the charter of the Free City, the draft constitution was submitted to Geneva for approval. The League Council demanded modifications of and additions to various provisions, and differences of opinion were not reconciled to its satisfaction until 1922. Approved by the Council in its final form, the constitution was promulgated on June 14, 1922. Throughout, the Council had insisted on anchoring parliamentary democracy securely in the constitution; it was not satisfied with less, although the form of government nowhere had been specified. But the spirit of the time demanded this and no other constitutional regime; had the people of Danzig wished an authoritarian or even a less democratic organization, it would definitely have been vetoed by the League. For once it concerned itself intensely with the form of government of a political entity which happened to be its ward. Political tutelage is likewise reflected in the provision of the constitution (Article 49, sec-

tion 3) that it may be modified or amended only with the approval of the League.<sup>81</sup>

During the following years the Queen of the Baltic became the problem child of Europe; no other territorial entity occupied the League and the Hague Court more frequently. Up to 1933, the League had to deal with Danzig complaints no fewer than 106 times. It could hardly have been otherwise. The experiment of an internationally exercised political guardianship was a novelty; in addition, the vested rights of Danzig were in a head-on collision with the economic demands of the rising state of Poland. But it is noteworthy that until 1933 the Geneva system was considered as Danzig's protective shield against alleged and real Polish encroachments. On the whole the League lived up to its duties as the guardian of the Free City, and the constitution worked smoothly. However, after the National Socialists triumphed in Germany in 1933, "*les querelles Polonaises*" which had constituted the sole points of friction disappeared by a sudden wave of the magic wand. Hitler and Poland's authoritarian rulers—Pilsudski and the colonels' clique—had come to an understanding in the German-Polish non-aggression treaty of January 26, 1934. Thereafter all complaints of Danzig to the League were concerned with the defense of the guaranteed democratic-constitutional form of government against Nazi violations. Poland remained wholly indifferent to the rapid Nazification of Danzig. By virtue of the affinity of political structure and ideology she had no interest in the preservation of democratic institutions inside Danzig—another proof, if such were needed, that allegedly unbridgeable cleavages between conflicting nationalisms were of lesser importance than the antidemocratic solidarity of the dictatorships.

The tragic story of Danzig's loss of her freedom cannot be told here in full. It epitomizes freedom's losing fight against the dictators all over the world. But some of the high lights are submitted here, if for no other reason than chastening our souls. There is hardly any issue—Manchuria, Ethiopia, Spain included—in which the League so ignominiously failed.

Danzig's tombstone is the lasting symbol of democratic humiliation.

The Nazis won the elections of May 28, 1933 (by 50.03 per cent), without, however, obtaining the required majority for constitutional amendments. Hermann Rauschning, at that time considered a moderate Nazi (does such a thing exist?), became President of the Senate,<sup>32</sup> but the actual boss was the Gauleiter Albert Forster. The Nazification of Danzig was possible only by intimidating, silencing, and finally outlawing the opposition parties of Social Democrats, Liberals, and somewhat later the Catholic Center, which at first shared the coalition government with the Nazis. It was possible only by openly violating and finally scratching the elaborate bill of rights and the constitutional guarantees. In all these respects the Nazis in Danzig faithfully followed the pattern of the Reich. But while the persecution of the political nonconformists inside Germany was connived at by the world under the ingrained prejudice that dictatorship in Germany was a strictly German affair with which nobody had a right—or a duty—to meddle, the surrender of the Danzig constitution to Nazi executioners was an international crime. The League had solemnly guaranteed the constitution. Year after year since 1934, the oppressed constitutional parties implored the League Council to protect the constitution; but their requests met with legalistic evasion, with procrastination (called postponement), with appeasement and cowardice. On the other hand, at least one High Commissioner, the fighting Irishman Seán Lester (in office from 1934 to 1937), distinguished himself by courageous opposition to the Nazi terror and by farsighted awareness of what Danzig's surrender would mean to democracy at large.

Of the sad record of Danzig before the Council of the League only the following incidents may be mentioned. On January 18, 1934, when the Council (reporter, Sir John Simon) was confronted with the complaints of the opposition to the effect that the individual guarantees of free speech, association, and equality before the law had been violated—opposition publishers and editors being placed under "protective

custody"—it confined itself to platonic statements concerning the preservation of constitutional life. As early as May, 1933, the trade unions had been outlawed and their property confiscated, under the pretext sustained by corrupt Nazi judges that they constituted only a branch of the corresponding Reich organization. In 1934 the Catholic Youth organizations were forbidden, and the Center party protested in vain to the High Commissioner (December 17, 1934). Danzig's criminal code was amended in order to promote terrorizing the opposition into submission. At the meeting of the Council on January 18, 1935 (reporter, Anthony Eden), the Danzig problem was "postponed." On April 7, 1935, the Nazis staged another election with unprecedented terrorism. The results were disappointing, however, since they gained only one seat in the Diet (*Volkstag*). This indicates the tenacity with which the opposition adhered to the democratic form of government. On May 25, 1935, the Council dealt with another series of complaints by the opposition parties and the Jewish community concerning violations of the constitution. This time the issue could no longer be sidestepped; and it was referred to a committee of jurists among whom was the famous Swiss constitutional lawyer Professor Fritz Fleiner. The report of the Committee,<sup>33</sup> although badly handicapped by the refusal of the Danzig government to provide precise information, found at almost every point flagrant violations of the letter and spirit of the constitution. All that the Council felt constrained to do (reporter, Anthony Eden) was to request the Danzig government to report through the High Commissioner, at the next meeting, what it had done toward restoring the constitutional rights. On the introduction into the Danzig penal code of a provision which abandoned the *nulla poena sine lege* maxim, an advisory opinion of the Hague Court was obtained. The court's decision<sup>34</sup> is remarkable in that it is based on the generally recognized principles of justice and law, in addition to specific provisions of the Danzig constitution. By a vote of 6 to 3, the amendments to the criminal code were declared unconstitutional because of their direct bearing

on the application of the democratic constitution.<sup>85</sup> A new climax of lawlessness was reached when the Nazified Danzig Supreme Court, by the decision of November 14, 1935, refused to cancel the fraudulent elections of the preceding April (with the exception of some rural districts). It would have been the bounden duty of the Council, as custodian of the constitution, to decree by itself the annulment of the election as well as of the decision. Visits abroad of the opposition party leaders in order to arouse the world conscience were as unavailing as were the tireless efforts of the High Commissioner to move the Council to action. At the meeting of the Council in January, 1936 (reporter, Anthony Eden), again only a face-saving formula emerged from the quagmire of appeasement, although by now violations of the constitution were admitted officially. The election issue was adjourned *sine die*. The Danzig government outwardly complied with the Council's request to amend the most obnoxious pieces of legislation. But the opposition was crushed beyond resurrection; henceforward the Nazi government of Danzig directed its attacks against the High Commissioner and the League itself, which at that time—revocation of the sanctions against Italy—had reached the nadir of its prestige. The Nazi president of the Senate, one Greiser, not only delivered at the League Assembly meeting in September, 1936, the rudest speech to which that august body ever was treated, but obtained international distinction by thumbing his nose at the assembled delegates (president, Anthony Eden)—a demonstration of Nazi diplomacy which, seen in retrospect, may well be considered as an appropriate gesture. All that the League did was to shift the responsibility for preserving the constitutional order to Poland—a move which in practice amounted to the renunciation by the League of the guardianship over the Danzig constitution, wholly illegal without change of the charter. But the sacrifice of democracy in Danzig meant nothing to Colonel Beck in Warsaw. Poland, hand in glove with Hitler under the nonaggression pact, in turn shifted the responsibility to the High Commissioner. At the next meeting of the Council on

January 27, 1937 (reporter, Anthony Eden), the High Commissioner—now the Swiss Nazi sympathizer Burckhardt—was officially advised not to interfere with the internal administration of the unhappy Free City. Thereafter Nazi terror played at will with Danzig. Long before September 1, 1939, when Hitler's legions invaded the Free City, she had become as Nazified as Germany herself.

In summing up the case against the first experiment of an international political tutelage over a nation or a fragment of a nation, it is evident that the indecorous spectacle heralded the downfall of European democracy at large. The phantom of internal self-determination, even if invoked by gangsters and accomplished by flagrant violations of the basic human and political rights, was once more triumphant over political democracy, even if placed solemnly under the custodianship of world organization and world opinion.



## CHAPTER IV

### *Intervention and Totalitarian Aggression*

#### THE TOTALITARIAN COUNTERREVOLUTION

To latter-day interpreters of contemporary history it might appear tragic that the experiment of the League coincided, within less than a decade, with the totalitarian counterrevolution against political democracy and its economic corollary, capitalism, which had been evolved by the ruling middle classes as the heritage of the French Revolution and the nineteenth century. Political institutions loom large in the perspective of the contemporary observer. In reality they are only reflections of social transmutations. Dictatorship and authoritarian constraint are the technical devices used by the leaders of the dispossessed masses, proletarian and white-collar, in their revolt against the merciless exposure to the business cycles, the seemingly inevitable consequence of liberal capitalism. The promise of economic security meant more to them than the formal political rights which equalitarian democracy had offered them instead of bread.

That a world revolution is under way is evidenced by the fact that both Bolshevism and Fascism, in their ideological premises and pragmatic strategy, had emancipated themselves from narrow nationalism. Both totalitarian ideologies operated from the very start on transnational lines. Individual state sovereignties had lost their meaning for international movements which dealt with classes and spaces beyond and above any national connotation. Totalitarianism is essentially universalistic and transcends the historically determined sov-

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See pp. 424-430 for footnotes to this chapter.

erelgnty of the individual state. The totalitarian mind is utterly impervious to national values and to allegiance to an individual state. A fascist or a communist, in his transnational fanaticism, could easily become a traitor to his own nation if it had a form of government or a structure of society which he hated. His devotion to a transnational ideal supersedes his loyalty to a national sovereignty. This may appear to be a strange statement at a time when the Second World War has been conducted, on both sides, as a struggle for national survival. At a later time it will perhaps be possible to discover more precisely the universalist design of contemporary world revolution behind its nationalist disguise.

#### INTERVENTION, TOTALITARIAN STYLE

Projected against the background of the totalitarian counterrevolution, the doctrine of internal self-determination and its derivative, the prohibition of interference by other states with internal autonomy, gain an altogether different perspective. The last decade may well be visualized as a global attempt, in the service of the counterrevolution against political democracy, at totalitarian intervention in the right of self-determination of other nations. Confined to isolated and sporadic application in the past, intervention, changing its name and becoming technologically streamlined, has risen in our time to universalist dimensions. The Fifth Column and the puppet government are the Nazi answer to the liberal dogma of political *laissez faire*. To the totalitarian, intervention becomes a moral duty and a legitimate method of political warfare—a prelude to, and instrument of, aggression and conquest. The border lines between intervention, aggression, and conquest are obliterated. Aggression is nothing but intensified intervention; intervention *is* aggression as much as intervention *is* conquest, whether accomplished secretly by political pressure and intimidation, or openly by military might. Likewise meaningless becomes the distinction between internal and external self-determination. A country which has lost its political independence and integrity, under the totalitarian strategy of conquest,

is compelled to accept a totalitarian, dictatorial, or authoritarian form of government. This is the second and even more significant aspect of totalitarian intervention: a consummated intervention cannot allow a form of government divergent from that of the conquering power; the conquered government must be coordinated to totalitarianism. Neither fascism nor communism could tolerate, within its sphere of command, political institutions differing from its own totalitarian pattern. Intervention invariably was followed by political coordination. This explains the similarity, to the point of identity, in the form of government between totalitarian states; to all intents and purposes they are interchangeable, regardless of scanty local variations. The Nazi system of political control is duplicated in all satellite states, and wherever totalitarian domination on the Nazi pattern exists. Even where the controlling power abstained, for specific reasons of expediency, from outright annexation (the Japanese in Manchukuo; the Germans in Hungary, Rumania, Bulgaria, Slovakia, Croatia, Norway), internal self-determination and constitutional autonomy were supinely overridden by political coordination. Within the totalitarian *Befehlsraum*, one and only one form of government is permissible.

The tactical devices of totalitarian intervention are so varied that even a summary description could not but grow into a full-fledged narrative of totalitarian aggression. Nazi intervention began, as a rule, with the demand by the controlled press and radio and by the government proper that the democratic state abstain from criticism of the Third Reich, its institutions, ideologies, leaders, by curbing the freedom of expression inside its jurisdiction.<sup>1</sup> Invariably it was followed by the request that certain obnoxious democratic leaders should be removed. Simultaneously the people of the state under attack were incited to rise against their government—an outright violation of international law which, though not requiring a state to suppress revolutionary propaganda committed on its territory against a foreign state, forbids such activities if conducted by the government or by agencies identified with it.<sup>2</sup> Persons out-

lawed by the Nazis were assassinated on foreign soil or kidnaped from it, in direct violation of internal sovereignty.<sup>3</sup> Hostile expeditionary forces against foreign states such as Austria and Czechoslovakia were established, trained, and equipped on German soil, also in violation of the law of nations.<sup>4</sup> In the Spanish Civil War, Italy and Germany honored their formal nonintervention pledge by sending to Spain full-fledged expeditionary armies, with the admitted aim of changing the internal form of government of that country to one homogeneous with the government in the dictatorial states, and, thus, secured Franco's victory over the republican regime.

#### INTERVENTION THROUGH THE FIFTH COLUMN

The chief instrument of totalitarian intervention in other nations is the Fifth Column. The tool of political coordination after conquest is the puppet government. Historically neither instrumentality is an invention of our time. The French Revolution made wide use of the former in the Rhineland, in Belgium, Italy, and Switzerland. Napoleon's satellite principalities and kingdoms of the family-clan type are well known examples of the latter. But international fascism and Bolshevism refined and rationalized both instruments to a degree never equaled. Technology has facilitated immensely the universalist design of modern totalitarianism. The strategy of political warfare was carried into the foreign countries by radio and all the other means of propaganda. The skillful combination of mass propaganda and mass organization in mutual support was unprecedented, and democratic-constitutional states under attack were at first utterly incapable of coping with intervention by internal subversion.

The story of the Fifth Column as the entering wedge for breaking down and undermining internal self-determination does not require retelling here. Long before Hitler's Reichstag address of February 20, 1938, in which he officially claimed the inalienable right of Germany to defend her *Volksgenossen* abroad, the German minorities in foreign states had been successfully used for intervention. The claim that a German by

blood, in spite of being naturalized in another state, owes permanent allegiance to the fatherland, constitutes a brazen interference with the internal sovereignty of that state. In due course, protection of Germans abroad became the pretext for intervention in, aggression against, and annexation of Austria, Czechoslovakia, the Memel territory, and Danzig.

But it is commonly overlooked that the Fifth Column is not confined to Axis stock minorities. Frequently internal subversion is conducted through what has been properly called indigenous totalitarianism—that is, political movements and parties which may not wish to convert their country into a German satrapy but are in sympathy with the totalitarian pattern and are addicted to it. Here the universalist design of the totalitarian counterrevolution against political democracy and capitalism appears in bold relief. It is true that in previous periods, likewise, ideologies such as liberalism and democraticism led to the emergence in practically all states of political parties dedicated to such universal ideals. But while such national parties may have imitated the foreign pattern or drawn inspiration from contact with their friends abroad they never stooped so low as to become tools of a foreign power against their own sovereign state. It was left to the totalitarian counterrevolution to utilize, in other countries, movements which under the guise of normal political parties operated on transnational lines and took advice, instructions, and orders of a foreign government or its auxiliary agencies, acting as decoys and spearheads for intervention by that government. The ultimate aim of such indigenous political groups was to coordinate the internal form of government to that obtaining in the totalitarian state. In this sense intervention by subversion has no historical parallel. Since the advent of Bolshevism in Russia and of Nazism in Germany extremist parties of the left and the right have appeared in practically every country, with the admitted aim of transforming the existing government into one similar to, or more homogeneous with, that prevailing in Russia or Germany.

## COMMUNIST INTERVENTION

In the formative period of the Soviet system, when Trotsky's missionary concept of the proletarian world revolution was dominant in Russia proper and dominated the Communist parties abroad, there were strong indications that the Soviet government through the Communist International, to which all foreign Communist parties were hierarchically subordinated, was bent on interfering with the internal form of government of other nations. Russian denials to the contrary were not convincing. Soviet Russia had a hand in the Communist upheavals in Bavaria and Hungary in 1919, and supported and recognized the revolutionary Communist group in Finland as late as 1939. The Communist parties in Germany, France, Italy, the United States, and other countries, in close orientation to Russia, conducted themselves as outposts of international communism. By no stretch of imagination could they be considered as regular national parties. But in fairness it should be stated that a change of policy took place in the second period of the Soviet evolution. Communism was to be confined to Russia proper; the Soviets, loyally cooperating in the League of Nations, abstained from using the national Communist parties as pressure groups for indirect intervention. Whenever requested by a democratic state, Russia would solemnly forswear any design of interfering with the internal autonomy through a Soviet-controlled indigenous Communist party.<sup>5</sup> As long as the Communist International existed, intervention by indirection continued to be a reality and a menace. Since it was dissolved on May 22, 1943, however, there has been no foundation for the charge that the Soviets still use the national Communist parties to influence internal politics. Whether Russia definitely has abandoned the missionary aim of making the world over to her image, or whether, after the defeat of Nazi Germany, she can rely for this purpose on the enormously increased international prestige of the Soviet system of government and society, is a moot question.

Until more, and more reliable, information is available

it cannot be stated with certainty that the expansionist dynamism of the Soviets, whether sailing under the flag of strategic security or conforming to the tradition of Russian imperialism, has used the disingenuous device of the puppet government to dominate formally independent states in her sphere of influence with the same brazen cynicism as the conquering Nazis did. It is noteworthy, however, that in most recent cases the absorption of foreign territories was accomplished by outright annexation. By this method were acquired not only lands that had been under Russian sovereignty before 1917 (the Baltic states, Bessarabia, eastern Poland) but likewise outposts claimed on the ground of defensive security (Bukovina, parts of Finland and of East Prussia). The technique of the Soviets differed at an essential point from that applied, under similar circumstances, by National Socialist Germany. After military occupation, lip service was paid, in some cases, to the democratic tenets of popular self-determination by staging "elections" and "plebiscites" intended to lend democratic legality to annexation. By virtue of unverifiable figures it was claimed that the people had "chosen" their new allegiance and form of government. The Nazis dispensed with the democratic coloration except in the case of Austria, where, in view of the perfected propaganda techniques and the advanced Nazification of the masses, the outcome was a foregone conclusion.

However, victorious Russia is in a position to demand and obtain political coordination of the governments in neighboring states without resorting to open intervention. The technique consists in sponsoring or at least supporting such groups as would constitute what the Soviets style "friendly governments." These are groups of persons whose political antecedents and aspirations form a guarantee that they will be and will remain favorably inclined toward the Soviet Union and the sociopolitical pattern developed by Russia. Whether such governments should be characterized as "puppet" is probably more a matter of terminology than a value judgment. In Rumania the governments which succeeded one another from

the time of the fall of the Antonescu regime apparently were formed by King Michael at first without open Russian interference. However, the sudden replacement, in March, 1945, of the government of Nicolai Radescu by that of Peter Groza lends substance to the belief that Russia will tolerate only pro-Soviet governments in nominally independent states bordering on her territory. This is suggested also by the internal regimes in Bulgaria and Hungary since the liberation. However, in Finland in March, 1945, honest elections resulted in a sharp swing of the pendulum to the extreme left. In Czechoslovakia, President Beneš assigned to the Communists a leading role in the composition of the new government, and in Austria a coalition government including Socialists, Communists, and Clericals was formed. Such reorientation toward the Soviet Union is probably due more to the spontaneous shift of public opinion at home than to pressure by Moscow. The most notorious example, however, of the Kremlin's ability to guide internal self-determination by sponsorship and encouragement of pro-Soviet elements, is the Polish Committee of National Liberation set up in Lublin after the diplomatic break with the London government-in-exile. Created in July, 1944, under the auspices of Moscow, it converted itself in due course into the Polish provisional government and was recognized by Russia almost at once. The procedure had the familiar ring of indirect intervention.

The Yalta Conference had striven to reduce the discrepancy between the Anglo-Saxon interpretation of the principle of free choice of government by a people and the Soviets' security demands, by requiring in Poland the establishment of a genuine provisional government of national unity including "democratic leaders from Poland itself and from Poles abroad," in other liberated territories the creation of "interim governmental authorities broadly representative of all democratic elements in the population" and subsequent free elections. These proposals prove, if proof be needed, that in many cases the distinction between the principle in Article 2 of the Atlantic Charter (no territorial change without the



freely expressed wish of the peoples concerned) and that in Article 3 (right of a people to choose its own form of government) is doctrinaire and difficult to reconcile with the hard realities. At any rate, Russia's power to compel the acceptance of territorial changes even without the expressed will of the population proves the obsolescence of unconditional external self-determination to which the Atlantic Charter subscribes, rather than her repudiation of democratic principles as they are understood in the western world.<sup>6</sup> And it would not be fair to assume that an interim regime with a definite slant toward the left is at variance with the sentiments of the majority of the people: radicalism after a lost war is common. It is indicative of the changed general approach to the problem of nonintervention that Russia's attitude toward neighboring states and her aversion against the resurrection of a *cordon sanitaire* were, on the whole, well understood by reasonable public opinion.

#### NAZI INTERVENTION

Contrariwise, the Third Reich used the indigenous Fifth Column as the instrument of intervention deliberately, consistently, and successfully. A national totalitarian party on the Nazi pattern had emerged in every country, organized by Nazi emissaries, sponsored and directed by the National Socialist party and its affiliated organizations, supported by propaganda, money, advice, and instructions from Germany. In every country subsequently overrun by military aggression the Fifth Column duly converted itself into the Trojan horse. Whenever German dissident minorities were unavailable, a native Nazi party was called into existence which provided the invader with the Quislings he needed for the puppet government and its administration. The record of Bohemia and Moravia, Slovakia, Norway and Holland, France, Rumania, Yugoslavia and Croatia, Greece, Hungary, and Bulgaria is common knowledge. In all cases the puppet governments were heavily tarred by the totalitarian brush. Within the German *Befehlsraum*, even where no annexation took place, the Nazis

insisted on complete coordination of the subjugated countries with the internal form of government of Germany proper. The stratagem of internal coordination has failed in Finland, Belgium, Poland—which, to her lasting credit, had no indigenous Fifth Column—and Denmark.<sup>7</sup>

Likewise in states which have remained neutral, indigenous Nazism was utilized as a foremost instrumentality of political warfare. Even where local totalitarian parties no longer served the Third Reich's universalist design of political conquest, they were promoted and encouraged by the Nazis because affinity in form of government—as persuasively demonstrated by Falangist Spain—would be advantageous to German interests during and potentially even after the war.

The last decade may well be visualized as a global attempt in the service of the counterrevolution against political democracy, of totalitarian intervention in the right of self-determination of other nations. Confined to isolated and sporadic application in the past, intervention has changed its name in our time. Technologically streamlined, it has risen to universalist dimensions. The Fifth Column and the puppet government are the Nazi answer to the liberal dogma of political *laissez faire*.<sup>8</sup>

#### DEFENSE AGAINST INTERVENTION BY INTERNAL SUBVERSION

With their cynical nullification of the accepted principle of nonintervention the Nazis turned the tables against the constitutional states; the unprecedented technique of intervention by internal subversion left these stunned and helpless. In the meantime the Fifth Column and the Trojan horse could comfortably settle within their midst. In most states an effective defense against the totalitarian attack, let alone a deliberate counterattack, was paralyzed by the very democratic institutions against which the assault was directed. The prevailing liberal climate, institutionalized in a bill of rights, persevered in granting constitutional protection to the Fifth Column with suicidal generosity. The democratic order impartially shielded its avowed enemies in their foreign-inspired and -controlled

efforts to subvert political democracy and to convert it into the totalitarian pattern. With the increasing danger, however, —the turning point may be placed in 1936 when Britain, citadel of democratic fundamentalism, enacted the Public Order Act (1 Edw. VIII & Geo. VI, ch. 9)—practically all constitutional states, with varying degrees of intensity, began to protect the form of government and the values embodied therein by a vast array of what aptly is called "legislation for the defense of the state."<sup>9</sup> In substance these statutes, frequently at variance with the traditional liberalism of an equalitarian bill of rights, and later amounting to veritable anti-revolutionary codes, have sought to arrest and to forestall the totalitarian political warfare by intervention through subversion. Step by step, the totalitarian technique of infiltration by skillfully combined propaganda and organization was met by countermeasures dealing with subversive organization (parties and associations); with totalitarian propaganda through press, radio, and other means of communication; with subversive symbolism such as uniforms and emblems; with the control of aliens; with abuse of citizenship by disloyal members of the naturalized Fifth Column; with totalitarian indoctrination in schools; with disloyalty of public officials; with foreign financing of indigenous fascism; with sabotage and preparations for civil war. Though the effectiveness of such legislative defense of the constitutional-democratic order in states which escape military aggression may easily be overrated in comparison with the deep-rooted loyalty of the people to their form of government, it is perhaps fair to say retrospectively that without such defense against internal subversion many states would have found it difficult to resist the totalitarian attacks on their internal self-determination. Sweden and Switzerland and Latin-American countries like Uruguay and Chile are cases in point. The energy with which totalitarian boring from within was met by appropriate countermeasures, was proportionate to the ultimate success in stabilizing and shielding political democracy. Naturally the states actually at war with the Axis could, and did, invoke emer-

gency regulations to hold down and stamp out the Fifth Column. Generally the result was that liberal democracy transformed itself into what may be called "disciplined" or "controlled" democracy—a trend which cannot fail to have its influence toward the reestablishment of constitutional democracy after the war.\*

On the other hand, as long as the democracies were still entangled in the liberal dogma of political indifference to other nations' internal affairs, they were utterly incapable of creating a common front of defense against the totalitarian aggression by indirection. The Geneva system could not be utilized for this purpose, although after the withdrawal of Japan and Germany in 1933 only Italy, the least effective partner in the later Tripartite Pact, remained in the League. But internal affairs of its members were taboo to the League. The pretense that intervention was not permissible was stubbornly maintained even after the cynical violation of the dogma by the dictatorships in the Spanish nonintervention farce.<sup>10</sup> Consciousness of the totalitarian stratagem of conquering the constitutional states one by one was conspicuous by its absence. Consequently, international efforts to combat international anarchy were fragmentary and were bound to remain ineffective. The source of the evil—namely, totalitarian disdain for international no less than for internal law—was beyond the reach of international action.<sup>11</sup> The only visible result of the totalitarian intervention by internal subversion was the adoption in 1936 of a feeble and inoperative convention concerning the use of broadcasting in the cause of peace. Germany and Italy, against whom it was essentially directed, did not even participate.<sup>12</sup> An equally dismal failure was the League-sponsored convention for the prevention and punishment of terrorism.<sup>13</sup> International terrorism had climaxed, on October 9, 1934, in the assassination of King Alexander of Yugoslavia and Foreign Minister Barthou in Marseille. But since the Axis and its satellites had included assassination and terrorism in its repertory of political warfare neither Italy nor Hungary,

\* See *infra*, pp. 126 ff., 309 ff.

which had harbored and trained the terrorists, nor Germany for that matter, ratified it. The menaced democratic countries, aware only of the symptoms, were unable to attack the cause of international anarchy—namely, the incompatibility, within the community of nations, of regimes predicated on internal and external violence.

#### DEFENSE AGAINST INTERNAL SUBVERSION IN THE WESTERN HEMISPHERE

Decidedly more successful was the Western hemisphere in meeting, and ultimately repelling, the totalitarian intervention through internal subversion. This is remarkable because the social structure, the habits of indigenous dictatorship, and the authoritarian traditions of the ruling classes in a number of Latin-American countries would seem to have almost predestined them to fall in with the totalitarian pattern. Moreover, it is proper to note that Pan-Americanism, in referring to the Latin-American “democratic” republics, glosses over the incontrovertible fact that, in spite of ultrademocratic constitutions which all possess, only a few of these countries can be spoken of as constitutional democracies in the accepted sense. Colombia, Uruguay, and Costa Rica unconditionally, Chile and Venezuela with some reservations, on their more recent record, belong to this class. But even though the majority of Latin-American states are governed by authoritarian methods none, with the notable exception of Argentina, has succumbed to the Axis totalitarian disease.<sup>14</sup>

In spite of, or perhaps because of, internal conditions the Latin-American states became conscious relatively early of the Axis political strategy aimed at converting one or more of them to totalitarian government. In many states considerable Axis-stock minorities which had resisted national assimilation, could be used by the wire pullers abroad as ramrods against internal self-determination. Particularly, Nazi Germany mobilized an endless and amazingly ingenuous variety of subversive techniques and devices. But after 1938 principles and techniques “to take the necessary measures to eradicate from the

Americas the spread of doctrines that tend to place in jeopardy the common Inter-American democratic ideal" were evolved step by step by consultative meetings of the foreign ministers—initiated by the Lima Conference of 1938—at Panama (1939), Habana (1940), and Rio de Janeiro (1942).<sup>15</sup> After Pearl Harbor, South America was alive to the very real danger of military invasion carried from Dakar to Brazil, for which the Fifth Column seemingly had been prepared over a long period.

Pan-American solidarity rose to the occasion. Resolution XVII of the Rio Conference became in due course the Magna Charta of coordinated and systematic defense against Axis intervention by internal subversion of the existing form of government. A special Pan-American agency was created in the Emergency Advisory Committee for Political Defense—since April, 1942, in uninterrupted session at Montevideo—to function as the general staff against political warfare of the Axis.<sup>16</sup> It is interesting to observe—and may well be a portent for the future not only in the Western hemisphere—that here, by an altogether novel and wholly pragmatic method, a technique was evolved which reconciled *mutual* nonintervention in internal affairs among the American states with that degree of collective influence and moral persuasion bearing on the internal conditions of each American republic which was imperatively required by continental solidarity. Safeguarding the internal form of government against totalitarian intervention was raised to a principle common to the community of American nations. Nonintervention in internal and external affairs is the "bedrock of Inter-American relations" (Sumner Welles). Throughout its activities the Montevideo committee has taken great precautions to conform to the Pan-American principle, enshrined in numerous conventions of nonintervention, in the internal and external sovereignty of the member states; but consultation and cooperation through the committee have amounted to the mitigation if not relinquishment of the dogma of nonintervention. Its subsequent "Recommendations" of legislative measures to all

American nations became so persuasive that the committee, the least publicized and the most effective instrument of Pan-Americanism, developed in due course, and almost automatically, into a common quasi-legislative organ of all American states, including the United States. Consciousness of common danger, and of solidarity of interest in combating political warfare of the Axis, was strong enough to induce all American states, while nominally preserving their internal autonomy, to make changes in and additions to their municipal law recommended by the Montevideo committee. Consultation evolved as the effective substitute for the discarded right of intervention among the American republics. This situation has absolutely no parallel in international relations although it may be found, with greater precision and fuller rationalization, as the constructive principle of federations or federated states.<sup>17</sup> Under the guidance of the Montevideo committee all American states except Argentina—where a military junta representing indigenous nationalism established a fascist regime for reasons of its own, and not primarily in order to promote Axis interest—adopted more or less uniform preventive and remedial measures, which ultimately neutralized the large-scale Axis attempt at coordinating the internal forms of government of American states with the totalitarian pattern. The encouraging result is that the maintenance of a totalitarian form of government, far from being a matter of indifference to other American states, has become so much the concern of every single one of them that the conversion of any one of them to totalitarianism would be considered as a danger to all.<sup>18</sup> As has been mentioned previously, the regrettable recognition of the fascist Farrell regime in Argentina has been a heavy reverse after auspicious beginnings which in the long run would have made the democratic form of government internationally mandatory in the western hemisphere.

One must not overestimate the value of legislative measures in any country to protect democracy which lack firm roots in a public opinion generally favorable to democratic

ideas and processes. But a retrospective comparison leads to the belief that, if Europe's democracies had shown as much solidarity as the Western hemisphere against the Nazi intervention by internal subversion, some of them would have preserved the democratic *status quo*, or at least would not have provided the Nazi invaders with a powerful Fifth Column. Seemingly the Western hemisphere has found in cooperation after consultation a pragmatic *quid pro quo* for the anachronistic dogma of reciprocal indifference to the form of government of other nations.





*Part Two*

THE FORM OF GOVERNMENT

## CHAPTER I

# *Form of Government and World Peace*

### THE THESIS BRIEFLY STATED

Leaving aside the arduous problem of nonintervention in the form of government of other peoples, we propose to investigate, in Part Two, the meaning of the term "form of government." Necessarily this leads to a discussion of that most controversial issue in the science of politics, the classification of governments and of states.

To anticipate conclusions, it is submitted here that there are today only two basic "forms of government": political democracy, and autocracy. For the present, the following may suffice as working definitions: A political democracy is a state in which the government's exercise of political power rests on the continuous consent of, and control by, the governed, through elections and representative institutions. An autocracy is a state in which the government exercises political power without such consent of, or control by, the governed. The distinction acquires point when applied to the system of international relations. There is an interrelationship or, it may be said, a causality between form of government and world peace or world organization; and the two are identical, as we have learned the hard way. In the simplest and least controversial terms, a nation organized as a political democracy is more inclined to cooperate peacefully with other nations, and is less prone to resort to violence and war, than one organized as an autocracy.

If these conclusions are correct—and they have to be

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See pp. 430-436 for footnotes to this chapter.

proved—it is obvious that the greater the number of political democracies after this war, the greater the chances for a durable peace and a workable world organization. The thesis can be phrased more peremptorily thus: If the establishment or subsequent emergence of autocracies is recognized as a menace to international order, the community of nations must see to it that they are not established, and that they are prevented from developing after this war. Consequently, the form of government of other peoples is of vital concern to all peoples. It is what may be called the categorical imperative of democracy in international relations. The *ceterum censeo* follows that the maintenance of the dogma of political *laissez faire* would seriously obstruct political reconstruction after this war.

#### WAR AND THE COMMON MAN

That war is the most grievous misfortune that can befall man, is axiomatic. It has nothing to do with the doubtful assertion of the pessimists that war is unavoidable unless its causes are removed—which seems clearly impossible—nor with the equally debatable contention that nothing is settled by war. It may be challenged by intellectuals of martial persuasion who wish us to believe that war is the supreme test of a healthy nation or individual and produces values and virtues no other human experience can evoke. But it is incontrovertible that the common man, whatever his nation, would condemn war as the worst of curses. His lot is to do the fighting and dying. He has nothing to gain from war. Only mercenaries, adventurers, and the socially unadjustable gain from it. The common man desires peace. To him a peace in misery, or a miserable peace, is better than any war. This primitive instinct has received forcible expression by poets of all nations and in all tongues that social psychologists or political scientists cannot hope to improve. Wars in the past were limited in scope and intensity and did rarely affect the mass of the people, although it was always the common man who suffered most. With conscription and mass warfare he

became the immediate victim of wars his government dragged him into. Total war and the diabolical invention of death and devastation from the air converted the entire population into combatants and their scanty possessions into the prey of battle. Perhaps the Second World War, the first total war, was needed to drive home this lesson.

To the common man it is a basic truth that there are no war-minded nations. Only the governments are war-minded. The war-mindedness of any nation at a given period is instilled into the masses by a militant and aggressive government, the power groups controlling the government, and the intellectuals in their service. Pacifism, isolationism, appeasement—whatever may be the national variation of war weariness—is deeply ingrained in modern man, and has a transcendental meaning. Not even the war-indoctrinated German people went enthusiastically into war when it was ordered by its government to fight and die.

#### WAR AND THE FORM OF GOVERNMENT

The causes of war are so manifold that no single reason can explain any single war; nor the most inclusive general etiology, all wars. Rational and irrational elements, economic incentives, historical myths and prejudices, accidental configurations of power, the psychological structure of the nations—a most complex factor in itself—all play their parts. Moreover, in any given case the determinants vary according to the observer. However, one aspect of the causation of wars has drawn surprisingly little attention; namely, the interrelation between the form of government and war. This may be due to the traditional indifference toward other peoples' internal affairs. The most cursory review of international wars in modern times would prove the assertion. None of these was started by a state organized as a political democracy. Since political democracy came to the world no earlier than the late eighteenth century, the experience of previous periods does not affect the argument.

The wars of the French Revolution originated in attacks

by the monarchical powers on the antifeudal forces incarnating the ideas of 1789. The wars of Napoleon against Europe—reactions of fear and terror of a single man if we follow Ferrero—emanated from a Caesaristic dictatorship, the modern version of autocracy. Under the peace settlement of Vienna, Europe enjoyed almost a century of unprecedented stability without a large-scale international conflagration. The major parties to the Crimean War were Russia, Turkey, France under Napoleon III, and Britain; and all except Britain were autocratic monarchies. Prussia fought the three wars of aggression against Denmark, Austria, and France as an authoritarian monarchy after Bismarck had eliminated, in the famous Prussian constitutional conflict, the opposition of the Liberals (Progressives) in the Prussian parliament. In 1870 both Prussia-Germany and France were authoritarian states. So were Russia and Turkey in 1877–1878 and Russia and Japan in 1904–1905. Without going into the controversial question of the guilt for the First World War it seems to be sufficiently established that the Western democratic powers were drawn into it by the authoritarian monarchies of Austria-Hungary, Germany, and Tsarist Russia. Likewise, in the long armistice between the two world wars practically all wars originated in authoritarian states: Russo-Polish War, 1920; Chaco War between Paraguay and Bolivia, 1932–1935. The Second World War was brought about by Nazi Germany, a totalitarian dictatorship. The superficial criterion of who first formally declared war is beside the point, because dictatorships dispense with such formalities. The policy of appeasement, whatever its demerits, demonstrated to the hilt the democracies' reluctance to take the sword, which they did only when they were in peril of annihilation.

This brief survey may be accused of oversimplification in view of the War of 1812, the Mexican and Spanish-American wars, and the Boer War, in which democracies were belligerents or even aggressors—conflicts more or less marginal in character. The evidence is abundant to prove that a government without constitutional limitations and able to control

public opinion is more likely to resort to war than a government that has to convince its people of the necessity of war. It is significant that recent efforts to make the actual declaration of war by a government subject to the specific ultra-democratic approval of a referendum are largely confined to political democracies. Unless all states abide by it, the mandatory submission of the declaration of war to a popular vote would place the democracies at an unbearable disadvantage.<sup>1</sup> Democracy does not go lightly to war. Would we have entered without Pearl Harbor? Contrariwise, dictatorships are driven to war by their own dynamism: internal tensions require an outlet in the emotionalization of the people attendant on a foreign war. It is nearly a historical law that dictatorships end in war and defeat. Cromwell's military dictatorship, which in no wise fits into the pattern of modern Caesarism, is one of the rare exceptions to the rule. On the other hand, democracies, in which the government rests on the participation and consent of the common man, are unaggressive because the common man abhors war and is able to restrain by democratic controls any militancy in his rulers. Only governments, it should be repeated, are aggressive. But the causality between autocracy and war does not end here. A government which has come to power and must maintain itself by internal violence cannot be expected to behave peacefully toward other countries. Hitler's methods in conquering first the Weimar republic and then the internal opposition to his regime, had close and, unfortunately, long ignored parallels in the methods with which he overcame the foreign opposition to his dominating Europe. The leopard could not change his spots. The principle of the rule of law is indivisible, as is peace: it cannot be denied internally, and honored externally, by one and the same government. The counterargument that even the most autocratic government, in going to war, requires the support of its people if not their consent, is fallacious. A political system based on compulsion which has robbed its people of the free manifestation of their reactions, may well purport to speak for the people or pretend that it is the people. If this

situation is realized in the light of the totalitarian aggression, the vital importance of the internal form of government of any nation to its neighbors and to all nations, long before aggression is actually committed, becomes plain.

#### INTERNATIONAL COOPERATION AND FORM OF GOVERNMENT

Against this thesis it may be argued that diversity in form of government has not prevented or impeded peaceful cooperation of nations.<sup>2</sup> The classic example is the alliance of the Most Christian King of France with the sultan of the infidels, without many qualms of conscience on either side; in recent times democratic France and Britain were allied with absolutist Russia in the Triple Entente; and in the present war Britain and the United States are allied with Soviet Russia, whose pretended democracy is hardly consonant with the *Federalist's* and Bagehot's and Mill's concepts of constitutionalism. We do not know enough about what may be the squared circle of a totalitarian democracy in Russia. At any rate, correct as the assumption may have been in the past, it has changed its complexion in our time. In earlier times, diversity in form of government did not preclude peaceful coexistence in the community of nations, because the states and their governments, whatever their political structure, agreed on certain fundamentals of international comity. Absolute monarchies had a sense of honor, partly traditional, partly based on an intangible group solidarity which made Tsarist Russia, the authoritarian monarchy in Germany, and even the Sublime Porte and the Shah of Persia (these two condemned by the political theorists of the past as the archetypes of despotism) abide by the rules of the international game. The mob-rulers, gangsters, Bohemians, and adventurers whom Fate in our time has lifted from the bottom ranks to the pinnacle of absolute power know nothing of honor or tradition, and the intellectual pimps who write their briefs and plead their case forget about it. The autocracies of old were conservative, trying to hold their ground against the rising tide of liberal dynamism in the same manner as the democracies in the period between the two world



wars tried to hold against the onslaught of the totalitarian tidal wave. Absolute monarchies did not conspire against states with a different form of government through intervention by internal subversion. They were not totalitarian to the point of enslaving the masses of their people. Whatever may be said against the internal organization of Tsarist Russia and authoritarian Germany, neither was a lawless state in the sense which makes totalitarianism the negation of law. The authoritarian government prevailing in the German Empire before 1918 was wholly compatible with the rule of law governing the relations between government and the common man. As long as autocracy confined itself to its own people, diversity in the form of government was not a primary cause of international disorder.

In our time autocracy, in the form of totalitarianism, has revolutionized international relations because of the exclusiveness of its ideological premises. Formerly international politics was governed by the liberal idea of live and let live. Political parties, even though they had their parallels in different nations, did not set out to convert, conquer, and dominate the world; forms of government had no missionary aspirations. Today a situation has evolved in which the "we or they" alternative is inescapable. One political system calls for the extermination and extinction of the other in order to secure its own survival. With the emergence of revolutionary world movements the problem of form of government has become transnational and uncompromisingly militant. The world has become so small and so closely knit together that, in Lincoln's words, it "cannot endure permanently half slave and half free."

✓ The dictator of our time lives in constant fear of rebellion, suspecting that as long as democratically constituted nations exist, his people will look with envy across their borders, remembering their own loss of freedom. Contrariwise as long as totalitarian countries exist, authoritarian-minded power groups in constitutional states will be tempted to imitate their pattern. It is this which renders diversity in form of government so dangerous to the world.

✓ It may be asked: What difference does it make if a nation

prefers a nonconstitutional form of government, provided that an effective international organization prevents it from going to war? The answer is that totalitarian ideologists have proved to be internationally contagious, as liberalism and democracy once were; and they will remain so for a long time to come. The most elementary rules of health demand that an endemic disease shall not be permitted to develop into an international epidemic. The idea that international fascism will disappear with the fall of the Nazi regime is a delusion. Under Napoleon, the Jacobin party was completely suppressed; yet international Jacobinism was resurrected with the label of liberalism, its victorious successor and heir. Nor will fascism lose its spell and magic only because its original champions are destroyed. An ideology which has so penetrated the imagination of millions, and (this should not be forgotten) has given so many tangible benefits to its followers, is bound to retain its appeal. Nobody familiar with the history of militant ideology would be surprised to find the generals of the Wehrmacht (fully as guilty as the Nazis) assume the protective coloration of non-Nazis, and bide their time for the next test. Therefore, any autocracy remaining after the war would become a potential center of totalitarian resurrection. Even without a *légende Hitlerienne*, the fascist myth, martyrology, and ritual will be emotional forces to be reckoned with for generations.

There is one point which should not be complacently overlooked. International fascism has become more than an ideology: it is a political technique which a resolute power group may conveniently apply within any country where democratic traditions either are absent or are loosely rooted. It is a technique of political domination which moves under its own steam. When Mussolini argued in the early years of fascism that it was no article for export, his contention had an engaging ring to the ears of the liberals, traditionally indifferent to other peoples' governmental experience. But in the current world revolution the fascist technique has become an international commodity, capable of successful introduction into any country under given conditions; and conditions can be

made to order by virtue of the identity of fascist institutions, almost interchangeable wherever fascism exists. Therefore the continued existence of fascist regimes, even in politically marginal or neutral states such as Spain and Argentina, is a serious threat to world peace which no denial of the ideological character of this war can minimize.

#### THE FAILURE OF THE LEAGUE OF NATIONS

The question why the Geneva system has failed, is of crucial importance for international reconstruction after the war. The breakdown of the first large-scale international experiment destined, in the words of the preamble to the Covenant, "to promote international cooperation and to achieve international peace and security" is variously ascribed to technical shortcomings such as the predominance of the principle of unanimity; to the basic structural defect in its lack of sufficient coercive power against recalcitrant members; to its failure to achieve universality by leaving powerful states outside and allowing a member to resign or to be expelled; to unadjustable political tensions arising from unjust peace treaties and the efforts of the victors to perpetuate them; last but not least, to the deplorable absence of an international morality. All these weighty arguments deserve attention and study in the founding of a new international organization; but, on the whole, they touch symptoms alone and do not reach the cause. The issue, enormously complex, must not be oversimplified. But if there is one primary reason for the failure it is the fact that, within one and the same organizational frame, antipodal and heterogeneous systems of government like dictatorships and the constitutional-democratic state are incapable of living together. This aspect of the Geneva system has been surprisingly little noted<sup>3</sup> in the vast literature on world organization in the past and in the future. It is self-evident that any international organization whose members do not work together on the basis of the rule of law, will be little more than legalized anarchy. The League of Nations was created for the effective cooperation of states under the universally accepted principle

of constitutional government, whether republican or monarchical. It was intended to be the means of peaceful settlement of controversies between states with the common belief in the rule of law and the principles of justice and equity. But it was generally ignored that the indispensable corollary of the rule of law between states is the same rule of law within the states. A dictatorship which scorns the rule of law within its own state is fundamentally incompatible with an interstate system based on constitutional procedures. It has abandoned within the state the constitutional procedures and guarantees which it is supposed to apply to its relations with other states. It treats its own subjects with violence and lawlessness; it spurns the sanctity of the rule of law in relations with them; it is operated by the hunches and obsessions of the men accidentally in control of the coercive power of the state. Such a government cannot possibly be conciliatory, law-abiding, treaty-observing toward other governments. Be it repeated: the rule of law is indivisible. It cannot exist with a split personality, extolling and practicing violence internally and devoted to peaceful methods externally. The autocracies of Japan, Germany, Italy were the wreckers of the League. They destroyed it by successive unpunished aggressions: Japan against China, 1931 and 1937; Italy against Abyssinia, 1935; Italy and Germany against Spain, 1936. Sanctions against Japan may have been impossible without the cooperation of the United States, which was not a member of the League; the failure of sanctions against Italy was due to the fact that influential sections of the ruling classes in Britain and France, sympathetic with the Italian form of government, could not or would not realize that Ethiopia and Spain were the curtain raisers for Hitler's large-scale aggressions.

In the long run, no dictatorship is able to resist the temptation to the lawlessness abroad by which it has profited at home. The brief history of the Geneva League evidenced that the Jekyll and Hyde situation of a dictatorship forsaking liberty within its national borders and playing the game of the League outside them was in no case enduring. Italy and Japan were

cooperative members of the League only as long as it suited the opportunistic or selfish interests of their autocratic rulers. The same is true, to a much lesser degree, of Russia—though her attack on Finland can be explained as a strategical move against the coming Nazi assault. In interstate relations the principles of constitutionalism and of despotism are mutually exclusive, and their presumed coexistence within the Geneva system was bound to destroy the League sooner or later. Had the experiment of the Holy Alliance been less obscured by liberal prejudices, the framers of the Geneva system could have learned from it that affinity if not homogeneity in form of government is the basic prerequisite of international co-operation.

Finally, one may wonder why sanctions by the League against a member that committed an act of aggression (Article 16 of the Covenant) were directed against the state violating the Covenant, and not against the government responsible for the violation. The League never chose to investigate why a member state resorted to aggression. It took the act of a government as implicating the state, even though the people of the allegedly violating state had no control over the act. What, after all, was the government? Merely a group of men who were known to have excluded their people from any influence on their decision. Thus the people were penalized for an act of their government of which they were utterly innocent, and the guilty government, in exclusive mastery of all manifestations of public opinion, could easily manipulate it in such a way as to make the world believe that its action was endorsed by the people. But the shibboleth of intangible internal self-determination prevented the question, Are the people aggressors, or the governments? and thus prevented an attack on the roots of the problem of international lawlessness and world peace. No security system will work—or will be fair, for that matter—unless it divests itself of the legally irrefutable presumption that any government (regardless of the methods by which it has come into power, and maintains itself) represents the people of its state, and unless it realizes

that sanctions applied against a state whose government does not genuinely represent its people may be a grave injustice, because an innocent people is made to suffer for its sinning government.

A serious study, by those who devised the new security organization, of this basic cause of international lawlessness should have led to a more precise definition of the aggressor. There is hardly an aggressor nation unless it identifies itself with its aggressor government. Probably in most cases sanctions against an alleged aggressor state can be avoided if the people are given a chance to pass judgment, by way of elections or through other democratic procedures, on the government which is guilty of aggression. Neither the Dumbarton Oaks scheme nor the International Security Organization of San Francisco reveals the slightest awareness of this crucial problem and its far-reaching implications. Obsessed by the traditional indifference toward the internal affairs of the "sovereign" states, they continue to identify state and government and, thus, heavily mortgage future security.

#### THE FEDERAL PARALLEL

A popular assertion is that world peace and world order would be secured best if all states of the world would organize themselves as a "world federation" or a "world state." The less ambitious of the utopians would be satisfied with a "United States of Europe," "Paneuropa," or "Union Now," and similar brotherhoods of nations in the Western hemisphere and in Asia. Such rhapsodies in geopolitics point out that the higher stage of world organization logically evolves from the historical precedents of the federation and the federal state, which demonstrate within their spatially more restricted areas what the world federation would accomplish in a global field.<sup>4</sup>

The federal concept covers two different forms of organization which are frequently not properly differentiated. The stage of federation usually precedes that of the federal state. A federation is a combination of sovereign states for common political purposes, in which the individual members renounce

some rights to the central entity or its agencies but retain their individuality as sovereign states. Contrariwise, a federal state is a new sovereign state formed by individual member states which, while retaining certain agreed rights, lose their identity as sovereign states.<sup>5</sup> Under the Articles of Confederation the thirteen colonies were a federation; under the Constitution of 1787 they became a federal state—the United States. Most federal states in existence today have passed through these two stages in their political evolution.

The premature application of the federal idea to the world at large is bound to fail, because the basic conditions and prerequisites of practical federalization do not exist at this stage. Every single historical federation or federal state originated from the organic and natural coalescence of separate political units into the higher entity. They could coalesce because each had developed a degree of social, economic, moral affinity with other units which, under a specific impulse, called for union with them. In most cases the affinity was accompanied by, and was dependent on, a considerable homogeneity in social and political institutions. Without such affinity of conditions and homogeneity of purposes, federal integration is impossible; nor can these prerequisites be presumed or artificially created. Whoever examines with an open mind the potentialities after this war must come to the conclusion that the countries of Europe, with their diversities of social standards, national traditions and ambitions, cultural patterns, have not yet attained such affinity and homogeneity as will lead to natural coalescence and permit the operation of the federal idea and the introduction of federal techniques. The "constitutions" of the "United States of Europe" written by eminent constitutional lawyers, the quota systems elaborated by expert card players, and similar intellectual pastimes are unrealistic and untimely. But all such endeavors are useful, because they keep alive the vision of a fully integrated world system which mankind is bound ultimately to reach in its evolution. If Hitler had been more than a narrow-minded and half-educated nationalist of the nineteenth century with the sour

heritage of petty Austrian provincialism, his "New Order of Europe" could have been a milestone on the road to a genuine European community of nations.

Dumbarton Oaks, more realistic and less utopian than the schemes of the new federalists and the powerful pressure groups behind them, has shocked them into silence for the time being. None the less, a closer study of the federal idea is rewarding, whatever its structure, aims, powers. The federation and the federal state have a number of features in common: The union of states is intended to be permanent; the federal entity guarantees to each member its political existence and integrity against compulsory absorption by other members or by foreign powers; the federal entity has the right—and the duty—to maintain peace and order between the members composing it. The essence of the federal scheme, thus, is the guarantee by the federal entity of the political existence of every member state, and the resultant right and duty of the federal entity to intervene in the internal affairs of the member state in case they conflict with the interests of the whole. This is the essential lesson which any international security system must learn from the federal parallel. Guarantee of political existence and right of intervention are necessarily complementary. The harmonious operation of the federal system demands homogeneity in form of government among the member states and the federal entity to which they belong. Both a republican federation in which the members are monarchies and, *vice versa*, a federation organized as a monarchy with republican member states, are theoretically and practically inconceivable. States entering a federation lose the privilege of determining their own form of government. Political alliances between republics and monarchies are possible and frequent, but diversity in form of government is incompatible with the federal idea. Security of political existence and defense against aggression are bought by the individual state through the surrender of its right of unlimited internal self-determination. Our own history testifies to the truth of this statement. The War Between the States came when the North tried to interfere with the internal



regime of the South, which insisted on its "right" to regulate the issue of slavery. Civil war was the logical result of John C. Calhoun's theory of unrestricted internal self-determination of the member states within a federal union, including the right to nullify federal acts and even secede from the Union. Insistence on states' rights—that is, unabridged internal self-determination—almost destroyed the Union. No federal entity can exist and operate with diversity among its members in form of government. The great Montesquieu fully realized that it is essential for any federal structure to be composed of states of similar or homogeneous forms of government.<sup>6</sup>

Consequently, most federal constitutions contain two principles in mutual support: (1) the requirement of homogeneity in form of government among the member states; and (2) the guarantee of a specific form of government to the member states. From the interplay of these two essential principles there follows the right of the federal authorities to intervene in the internal affairs of any member state which fails to fulfill the basic condition of homogeneity in form of government. Sacrifice of internal self-determination by the members is more than compensated for through the protection and guarantee by the federal entity.

Our own constitution (Article IV, section 4) conforms to this principle: "The United States shall guarantee to every State in this Union a republican form of government." Mandatory assimilation or coordination of member states in their forms of government to that of the federal entity is the rule of all Latin American federal states.<sup>7</sup> While in most cases the requirements are limited to acceptance of general principles (such as the republican, or the republican-representative and democratic form of government) and leave the implementation to theory and practice,<sup>8</sup> a number of federal constitutions contain definite institutions for the setting up of member states under the federal system. Switzerland guarantees the cantonal constitutions only if they contain nothing in conflict with the federal constitution; if they guarantee the exercise of political rights according to the republican (rep-

representative or democratic) principle; and if they are accepted by the absolute majority of the citizens and remain subject to amendment by it.<sup>9</sup> Germany, the country with probably the amplest experience in federalization—beginning with the German Confederation of 1815<sup>10</sup>—insisted down to 1933 that the forms of government of the member states must be homogeneous. The democratic constitution of the Paulskirche went so far as to prescribe detailed minimum standards for the regimes of the member states.<sup>11</sup> The Imperial constitution of April 17, 1871—based on a compact of the rulers—set no specific conditions for the form of government of the member states; but a monarchical form was tacitly implied. The Second Reich embraced twenty-two monarchies and the three free Hanseatic cities—an anomaly which was not in the slightest disturbing. The republics did not think of proselytizing for their form of government, and the city representations were as pompous as their monarchical counterparts. However, Article 17 of the Weimar constitution of August 11, 1919, not only confined internal constitutional autonomy to the “republican form” of government,<sup>12</sup> but, in addition, established obligatory norms for accomplishing this: the parliament was to be elected by equal, universal, direct, and secret vote of all German men and women according to the principles of proportional representation. Identical standards were to be applied even to the municipal elections. This article was interpreted by the authoritative commentators as setting forth that only a genuinely democratic-representative form of government was permissible to the *Länder*, and excluding monarchical as well as Soviet institutions and the rule of a class minority (aristocracy). A dictatorship (fascist or communist) was incompatible with the federal constitution. Within these limits, however, the *Länder* were free to organize themselves as they saw fit, and many constitutional variations were in force throughout the Reich.<sup>13</sup> On the other hand, the Reich intervened repeatedly in the *Länder* which strayed from the path of constitutional government, particularly in Thuringia, in Saxony, and in Bavaria where, in 1919, a full-fledged Soviet republic had to

be downed by armed force. The best known case of federal intervention in a member state, during the republican period, is the dislodgment of the Socialist-Centrist government of Prussia by the ultranationalist Reich government of the reactionary von Papen in 1932. The case does not quite fit into the system of federal intervention for the maintenance of the form of government in that the government of Herr Otto Braun was legally constituted in conformity with the principles both of the Prussian and of the Reich constitution. Intervention in this case was power politics for party reasons without any pretext of legality. Undertaken by an authoritarian cabinet without support of the parliament or the voters, it preluded Hitler's subsequent complete coordination of the *Länder* to the form of single-party government prevailing in the Reich.<sup>14</sup>

In line with traditional terminology such intervention was called *Bundes-Exekution*.<sup>15</sup> On the other hand, a federal Constitutional Tribunal (*Reichsstaatsgerichtshof*) provided for the peaceful settlement of constitutional controversies between the Reich and an individual *Land*, or between individual *Länder*, by judicial decisions, which—a remarkable success of an altogether new experiment in the application of democratic procedures to interstate relations—were faithfully observed by all litigants. Be it noted that the term “intervention,” used for the right of a federal union to maintain homogeneity in government among member states and conformance with the federally prescribed rules for it, was deliberately taken from the practice of international law.

Our own constitutional history contains a most pertinent illustration—nowadays regretfully remembered in some quarters—of the insistence on the basic prerequisite of any federal union; to wit, that member states must be homogeneous in form of government among themselves and with the federal entity. During the period of Reconstruction the victorious Union imposed upon the vanquished states compliance with rigid terms for readmission into the Union.\* Among the terms were: exclu-

\* For other aspects of the American Reconstruction period, see *infra*, pp. 301 ff.

sion of certain notorious rebels from the right to hold state or federal office; exclusion from the franchise of citizens who would not swear allegiance to the principles of the Union; federal control and supervision of the new constitutions to be adopted by the vanquished states; fulfillment of certain conditions in the adoption of these, such as the holding of conventions, and the ratification by a majority of the qualified voters; federal policing of electoral processes in order to protect the interests of the Union, which were deemed common to all states; certain legal conditions for subsequent participation in the Union, such as acceptance of the Fourteenth and Fifteenth amendments. We are not concerned here with the wisdom or the effectiveness of such methods of federal compulsion. But there is hardly a more striking example in history to prove the cardinal principle that in any federal state national unity can be achieved, in the long run, only through political uniformity among the member states, and that even compulsion is justified as a means of bringing about this supreme goal.

The lessons of the federal idea for political reconstruction after the war are obvious: If homogeneity in government among the member states of a federal system is vital both to the federal government representing them all and to the member states themselves, and if that federal government has incontestably the right and the duty to supervise observance of its minimum requirements, then a similar homogeneity among the nations participating in an international organization which follows in substance the federal pattern, even though it is not a federation, is of vital concern to them all. This premise being accepted, the conclusion follows that, among the member states of an international organization, no form of government must be established which is inconsistent in nature and techniques with the international aim, preservation of world peace and world order.

## CHAPTER II

### *Discourse on the Classification of States and Governments*

Article 3 of the Atlantic Charter, in proclaiming the right of every people to choose the "form of government" it will live under, implies that there are several such forms from among which each nation may make its selection. Which are those that are available today? Seemingly the authors of the document, representing the two leading political democracies of the world, exercise a commendable restraint in phrasing the article. Nothing would have been more understandable than that they should indicate at least their preference for the form of government of their own countries. But, deeply imbued by the liberal tradition of political *laissez faire*, they not only refrained from advertising the value of their own national product but seemed to be unwilling to admit that there are differences in the rank and grade of governmental forms. United against totalitarian dictatorship, they must, after all, have been aware that the existing differences in form of government pertain to quality as well as to form.

The following discourse on the classification of states and governments sets out to prove by elimination that, in terms of the rationale of the Atlantic Charter itself, the potential choices of the form of government are substantially limited. Tabulation of the available "forms of government" would be meaningless unless it permitted, by way of comparison, a value judg-

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See pp. 436-438 for footnotes to this chapter.

ment as to which among the different forms are "good," which "bad," and, perhaps, which is the objectively "best" form of government.

#### THE SEARCH FOR THE "BEST" FORM OF GOVERNMENT

To classify and to evaluate forms of states and of governments is one of the oldest and most respectable tasks of political science. If these exercises had been conducted only to satisfy the classifying urge of thinking man and his intellectual curiosity, the ink poured out on the subject would have been futile. But always the effort was geared to the discovery of qualitative preferences. It received its stimulus from the search for the "best" form of government since dissatisfaction with existing political conditions seems to be an inherent trait of the political animal, man. Every reputable political thinker ultimately differentiated between recommendable or "good," and reprehensible or "bad" forms of government. Aristotle was the first to try his hand at the game; he established, on the empirical basis of a comparative material never equaled, the classic division in accordance with the number of persons holding political power, into monarchies, aristocracies, polities (his name for what we moderns would call constitutional democracies). It has long been recognized that such a purely quantitative distinction is pointless and mechanical unless supplemented by a qualitative evaluation which Aristotle found in the "perversion" or "degeneration" of these basic "ideal types," eloquently described as tyranny, oligarchy, democracy (or mob rule). Aristotle was wholly conscious of the fact that there are no good or bad types of government *per se*: the qualification is always dependent on the government's use of its political powers, whether for its own benefit, for a class or group interest, or for the common welfare. He himself favored the middle-class ideal of the polity, the undegenerated form of rule of the people for the benefit of all. Ever since Aristotle, the accent of the classifying analysis was on the "best" form of government. As a rule the great political thinkers did not project their speculations into a utopian vacuum of what ought to be—they idealized, mostly for very

practical reasons, a specific and concrete state organization; and among political systems those of Rome and Britain have deservedly enjoyed the greatest reputation through the ages. Realistic enough to discard Aristotle's rigid formalism of "pure" forms, his successors found in the "mixture" of the classic elements the "best" form of government. Polybius, fascinated by the glory that was Rome, stands at the beginning of this impressive ancestral line, followed by medieval scholastics climaxing in Thomas Aquinas. The systematization of the constitutional state, pragmatically developed in modern times first by England as a priceless gift to Western civilization, was possible only through the concept of the "mixed" form of government. Locke, Bolingbroke, Montesquieu, the *Federalist*, French and early German liberals, by commonly adhering to the "mixed" form of government as the key to the best state, actually canceled out the classic division and fused its categories into one. On the other hand, the "absolutists" among the political thinkers—Machiavelli foremost, but no less Bodin, Hobbes, Rousseau (whose totalitarian implications one is surprised not to see better utilized by the Nazis)—leaned heavily toward the "pure" forms of government, whether absolute monarchy or absolute democracy which, from the eighteenth century down to De Tocqueville, Burckhardt, and Spengler, were justly condemned as tyrannical.

It is unfortunate that no political philosopher of our day, so much wiser by new techniques and institutions, has been moved to rewrite the analysis of the classification of governments. The gap is due, perhaps, to the fact that we have become more skeptical as to the "best" form of government than were the Solomons and Solons of the past. Our relativistic sophistication shrinks from generalizations. The most we are willing to admit is that some forms of government are better than others for specific peoples. The liberal attitude of indifference to, and the argument of nonintervention in, other peoples' internal affairs are colored by such relativism. This is all the more regrettable because we know from our own cruel experience that certain forms of government are bad for any people even

though there may be no single form of government which is good for all peoples.

#### THE TRADITIONAL CLASSIFICATIONS

The road toward a realistic reclassifying of forms of government is still blocked by conventional terminology. Tradition has provided us with two separate sets of divisions which political theory since has combined and confronted in endless variations: the Aristotelian tripartite classification of states or governments as monarchies, aristocracies, and democracies or polities, according to the number of persons holding power; and Machiavelli's<sup>1</sup> dualism of monarchies and republics, accepted by Hobbes, Rousseau, and many others. His assumption—perceptibly influenced by his experience of the rising national absolutist state in Italy—is that in a principality (monarchy) sovereignty rests with one man whether by right or by usurpation, while in a republic sovereignty rests with more than one man. But, differing from the quantitative nominalism of older political theory, Machiavelli treats aristocracy and democracy as substance and content and not as form and frame. This monarchy-republic classification has grown into a veritable stereotype, which is probably what the authors of the Atlantic Charter had in mind when they wrote into it the choice of the "form of government."

Both traditional classifications are utterly useless in our day because they refer only to the external framework of governments, and not at all to their actual conduct. Nor do they indicate the respective social forces behind the republican and the monarchical façades which make the wheels go round. This defect is made understandable by the excessive legalism of previous political theorists who, while pretending to be objective, actually were out to write a brief in the specific case they had at heart. Montesquieu, whose genius shines more today than ever, came much closer to realities when he implemented the traditional classification of states—which visualized them merely as organizational patterns—by ascribing to each type a moral principle or a social idea; namely, virtue to democracy,



moderation to aristocracy, honor to monarchy. The only defect of this sociological approach was that his principles did not fit the types of government, and his historical material did not support the principles. It was left to recent sociologists—Mosca, Pareto, Michels, Max Weber—to demonstrate that no connection whatever exists between forms of government (institutional arrangements) and social forces (the objectives for which they are, or can be, used). They have demonstrated that every state, regardless of its form of government, is operated by an oligarchy—whether professional politicians, bureaucracy, vested economic interests.

It is obvious that the sociological approach is so incompatible with the classic stereotypes for differentiating forms of governments that in our time the very term "form of government" has an antiquated ring. What does it explain of the nature of a state? Both monarchy and republic, as regards social determinants of political power, can be—and are—militaristic, plutocratic, bourgeois, squireocratic, capitalistic, bureaucratic, oligarchic, feudal. Aristocracy, once universal suffrage had triumphed universally, ceased to exist as a "form of government." Monarchy, conceived in the spirit of divine right, is today a mere echo of its past except when approximating dictatorship; and then it relies no longer on the magic of kingship but on the bayonets of its armed forces. Nor is republican government identical with democratic rule, though for reasons widely different from those for which the Enlightenment and the *Federalist* resisted the introduction of democracy. A monarchy can be democratic and frequently is, while a republic can be tyrannical; and this renders meaningless the formal distinction between monarchy and republic. The republican form of government has become a frame for a one-man dictatorship which, more absolute in power than the most absolute monarch of the past, is not classified as a monarchy. Nazi Germany—in spite of the claim of the Nazis that the Third Reich, as *volksgeführte Demokratie* or as *Führerstaat*, forms a class by itself<sup>2</sup>—is formally republican. Fascist Italy before the repudiation of Mussolini by the Crown was identical with the German

totalitarian dictatorship in the exercise of political power; but it was still to be classified as a monarchy, along with Great Britain, which was in substance a constitutional democracy. At the same time, in terms of the stereotyped classification, the United States and the Third Reich had to be grouped together as republics.

#### A REALISTIC CLASSIFICATION: POLITICAL DEMOCRACY AND AUTOCRACY

The inescapable conclusion drawn from these absurdities to which the classical stereotypes lead, is the demand for a more realistic substitution. "Form of government" is not determined nor determinable by any formal criterion, nor by any social principle or moral idea. It must be based on appraisal of the methods and techniques which are used, in any particular state, for the exercise of political power by the government. Form of government is the manner in which political power is created for, and exercised by, those holding it. This is by no means a novel method. Bodin properly distinguished between type or form of states (*status reipublicae*) and type or form of government (*ratio gubernandi*).<sup>3</sup> Kant<sup>4</sup> expressed the same idea with inimitable clarity. A more legal twist can be given to the definition by saying that the form of government is circumscribed not by who represents the will of the state but how—that is, by what procedures and techniques—the will of the state is formed. From this it appears that to differentiate between "forms of government" and "forms of state" is of no more than historical relevance. True, state and government are not one and the same. But the type to which a state belongs is determined by the manner in which it is governed; and, in turn, the type to which a government belongs is determined by the manner in which it reflects the will of the people.

If we accept manner of exercise of political power as a serviceable classificatory principle, governments of today are either political democracies or autocracies. Both terms require definition, which should be brief, broad, and nontechnical. Political democracy,<sup>5</sup> then, is the form of government whose legitima-

tion is the democratically manifested consent of the people. The government obtains office through consent of the people and is accountable to them for its conduct of office by democratic techniques. The principle of the political democracy is the rule of law. Political democracy is nothing else than Lincoln's immortal "government of the people, by the people, for the people." To too many in the United States this phrase has become a worn coin in the currency of politics, expressive of patriotic exaltation when called for, at best an accepted verity. To less fortunate nations it will be, after this war, gospel and revelation. The Atlantic Charter could not equal Lincoln's utterance of mankind's aspirations and hopes in a phrasing as simple and as deep as his humanitarian spirit.

Autocracy is the form of government whose legitimation is constraint, without democratically manifested consent of the people; and, even if the government has come to power through consent of the people, it is not accountable to them for its conduct of office by democratic techniques. The principle of autocracy is arbitrariness. The reservation in this definition concerning access to power is required by the version of autocracy characteristic today—democratic Caesarism—in which the dictator is given power without constitutional limitations and for an indefinite term, seemingly by consent of the people.

#### PERMISSIBLE AND NONPERMISSIBLE FORMS OF GOVERNMENT UNDER THE ATLANTIC CHARTER

It is unlikely that the fathers of the Atlantic Charter indulged in much political speculation, though there seem to be no limits to Mr. Churchill's erudite ingenuity or to Mr. Roosevelt's mental elasticity. In its phrase "form of government" they probably had in mind nothing more than the familiar alternative of monarchy or republic, with the endless variations of these among present-day states.<sup>6</sup> Certainly the historical existence of many other forms of government—for instance theocracy (which pretends to institutionalize the will of God), aristocracy, plutocracy, oligarchy—was not in their minds. Such systems grew out of the social structure in earlier times; they

cannot be organized deliberately today. Republic and monarchy, however, as forms of government naturally imposed themselves on the minds of the authors of the Atlantic Charter: the prime minister of a monarchy, and the president of a republic. These, and these alone, were the types eligible for internal self-determination under Article 3. In the light of the two men's records, and of the occasion, it is inconceivable that they have envisaged as eligible any other system than political democracy. This is their own peoples' form of government, even though they differ in political organization. It is inconceivable that the Atlantic Charter, whose *Leitmotiv* is liberation of the world from the curse of autocracy, should offer to a nation the right to choose dictatorship, fascism, totalitarianism. notwithstanding Mr. Churchill's kind words for fascism in Spain, that deplorable product of expediency. Consequently, the primary choice of autocratic government by any nation, or the subsequent voluntary transition to this by a democratically organized nation, is ruled out.

Granted that the Atlantic Charter contemplates only republic and monarchy as eligible or permissible forms of government, it remains to apply to these terms the yardstick of a realistic division of forms of government into political democracies and autocracies. In the briefest and most concise terms: Every people has the right to choose republican or monarchical government, provided that either of them is substantially democratic and does not amount to autocracy. Later sections of this book will establish the essential criteria for judging the form of government called political democracy,\* and will investigate the conditions under which monarchy—*prima facie* a permissible form of government—may become ineligible.

But the analysis is not a case of *l'art pour l'art*. When applied to political reconstruction after this war it leads to a definite conclusion: Since the establishment of an autocratic government by any member of the community of nations is conducive to international disorder and is a menace to peace, it is the duty of the international organization, whatever its

\* See *infra*, pp. 119 ff.

future form, to concern itself with the form of government of its member states and to see to it that autocracy is not chosen.

#### DOES A PEOPLE "CHOOSE" AUTOCRACY?

A final argument in support of the thesis that an autocracy is not permissible or eligible under the Atlantic Charter, may be distilled from its own phraseology. When a people "chooses" its form of government, it commits itself to a democratic procedure. Choice is an act of free volition and of self-determination which presupposes an election, a plebiscite, or other rational manifestation of will. The choice of autocracy is a *petitio principii*. No people ever has chosen, of its own volition, an autocratic form of government. Absolute monarchy in the past was not rationally chosen: it existed by tradition, habit, lack of alternatives, and was accepted as such. Elective monarchs were exceptions, and were always named in accordance with feudal principles of representation. Since the French Revolution, whenever a nation has chosen monarchy as its form of government, it has been definitely implied that the ruler shall be constitutionally limited. Nor is there a single case in history in which a people has voluntarily submitted to a dictatorship. Constitutional dictatorship in European and Latin-American states<sup>7</sup> must not be confused with autocracy, because it remains subject to constitutional limitations in time and scope. Never has a people chosen democratic Caesarism, the modern variant of autocracy.<sup>8</sup> As the personal regime of a "charismatic" leader,<sup>9</sup> it may pretend to have been carried into power by the will of the people, manifested in election or plebiscite, and thus to have a democratic substructure. But a close study reveals that in every case of Caesarism, even if the man who became dictator attained power by constitutional methods, the regime was actually consummated by *coup d'état*, usurpation, illegality, violence, and fraud. Universal suffrage, intrinsically the most democratic institution, usually served to bring the dictator into power; but in no case has he been confirmed in office by an honest and free manifestation of the popular will; and the plebiscite, because of its common abuse to indicate popular

support for the dictator, has lost repute as a method of democratic consent.<sup>10</sup>

While, thus, no people ever has chosen autocracy, and while it is not likely that, after this war, any will use its right of internal self-determination to elect an autocratic regime, there is a serious danger that a people may surreptitiously slide into it, or be led into it. It is here that the right of collective intervention by the international security organization must be asserted. In the interest of world order and world peace, autocracy must be considered as a nonpermissible form of government. How it is to be prevented should have been one of the primary preoccupations of any international organization of the peace in the future. But this will be possible only after the doctrine of the "untouchable" character of internal sovereignty has been thoroughly demolished.

## CHAPTER III

### *The Essence of Political Democracy*

#### RECONSTRUCTION OF CONSTITUTIONS

Unless the distinction between permissible and nonpermissible forms of government is clearly realized and enforced, political reconstruction after the war is bound to risk frustration from the start. The choice of a form of government by a people means in practice the elaboration and adoption of a constitution.\* Morally, the basic charter symbolizes and articulates internal self-determination. Politically, the essence of a written constitution is limitation of political power exercised by the government. By its very existence the constitution restrains and prevents arbitrary use of political power. Government under a constitution is "constitutional."

Autocracy cannot operate under a constitution and therefore, as a rule, dispenses with one. It cannot countenance, and would not endure restriction in the exercise of power, because the formalization of authority is inconsistent with its dynamism. Caesaristic dictatorship in particular is incompatible with any constitution limiting its omnipotence. It justifies itself by the claim that it can fulfill its mission for the people only if it is free from any constitutional limitations in time and in scope.

The political experience with dictatorship during the long armistice amply supports this statement. Where the constitution in force was elastic enough to permit dictatorial exercise of power as in Italy (the constitution granted by Charles Albert in 1848 could be amended without qualified majorities of the parlia-

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See pp. 438-441 for footnotes to this chapter.

\* Dealt with more fully *infra*, pp. 275 ff.

ment), it did not suffer extinction: it "adjusted" itself to autocracy. Where the existing democratic constitution was in conflict with the dictatorial system, it was either formally abolished, as in Franco Spain, or factually superseded without being formally repealed, as in Germany and in Vichy France. In some cases the constitution was redrafted by the dictatorial regime in order to maintain the requirements of pseudolegality. This technique was used in Yugoslavia to legalize the royal dictatorship (1931), to establish authoritarian government in Austria (1934) and in Poland (1935). It is significant that modern authoritarian government camouflages the usurpation of power through *coup d'état* by constitutional reform, possibly without visible break in the legal continuity. In Brazil the democratic constitution of 1937, though by no stretch of imagination overly democratic, was annulled at birth when Vargas invalidated it by assuming emergency powers. The methods of the different autocratic regimes vary with the circumstances, in particular with the popular support available; but in no case was the constitution an effective brake on the unlimited exercise of political power by the government.<sup>1</sup>

The only exception to the rule that dictatorship is incompatible with a written constitution is Soviet Russia—which does not necessarily prove the rule. The anomaly is readily admitted. To explain it, we should know more about conditions in Russia. It may well be—as the support given by the Russian people to the Soviet regime during the war seems to prove—that the Soviet system is no longer a dictatorship in the sense the fascist autocracies have been. It may well be that, once a generation wholly indoctrinated by the new values has taken the place of the forcibly liquidated nonconformists of the preceding generation, totalitarianism and consent are no longer mutually exclusive. Probably by 1936 Russia had reached a stage of intellectual and moral consolidation which permitted the rationalization of the supreme power of Stalin and the Communist party in a constitutional form, which, without being democratic in the Western sense, is democratic enough to allow the effective operation of a constitution. There is no foundation for the



belief that the Soviet constitution is merely a façade, disregarded by the Soviet government. Nor can it reasonably be assumed that the Russian people, given a free choice, would replace their system by any variant of democracy prevailing in the West.

Since the American and French revolutions every great upheaval has been followed by the rationalization of political power in a constitution. The victory of bourgeois liberalism over feudalism in the nineteenth century, the elimination of authoritarian monarchy by democratic self-determination after the First World War, everywhere brought new constitutions. Possibly after this war another tidal wave of constitution making will sweep over Europe. It will be shown later \* which of the liberated countries are in a position to revive their existing constitutions, held in abeyance during the occupation, and which are likely to adopt new fundamental charters. It is true that there was more constitution tampering in the decade preceding the Second World War than in any other period. Constitutions have lost much of their magic for the common man since he has witnessed the havoc played by governments and corrupt representations with their sacred pledges. Too brazenly has the device of constitutional "reform" been abused by the powers that be. Nor can our sophisticated generation recapture the naïve optimism of the awakening nations in the eighteenth century, to whom a new constitution was the guarantee of happiness and prosperity. The nations will approach the task of constitution making in a chastened mood; to all nations forced to live under autocratic lawlessness, their constitutions, new or old, will become symbols and instruments for revitalizing their self-respect and self-determination. The most dignified manifestation of regained liberty will be the constitution.

It is unlikely that the United Nations, after the cessation of hostilities, will have lost the traditional respect for foreign sovereignties so far as to outlaw autocracy as a form of government. Neutral nations are beyond constraint anyway; and even the United Nations most in need of democratic recon-

\* See pp. 215 ff.

struction, claiming membership in the victorious group, are impervious to limitation of their internal sovereignty. But at least the framing of constitutions by the defeated Axis states and their satellites should be closely supervised by the United Nations, to prevent either open or hidden persistence of autocracy.

#### NO MODEL CONSTITUTION INTENDED

The limitation, for certain nations, of the choice of the form of government to nonautocratic patterns by no means implies a uniform pattern. The idea of a model constitution for all nations is absurd and futile. The world would be dull and meaningless in the strait-jacket of uniformity. Democratic regimentation would be hardly less intolerable than totalitarian. There is no such thing as a best form of government or an ideal state. Nations are individualities; their cultural, social, political traditions and conditions differ widely though, under the influence of world movements and world ideologies, they are more homogeneous now than they ever have been. Differences in class stratification require different political institutions. The degree of urbanization and industrialization, the level of education, and many other factors determine the *Gestalt* of a political order and cannot be ignored in the framing of a constitution. Uniformity in political techniques and institutions would defy the very purpose of a written constitution, which is to mold divergent political and social forces into national unity. The British parliamentary system, easily the most successful form of government of our time, is a nontransferable commodity. So are probably all other individualizations of the generic pattern of political democracy. After the First World War no fewer than fourteen states—Germany, Austria, Danzig, the three Baltic states (Lithuania, Latvia, Estonia), Finland, Poland, Czechoslovakia, Hungary, Yugoslavia, Bulgaria, Rumania, Greece—at one time or another adopted the pattern of political democracy. In 1938 only Czechoslovakia, Finland, and, with some reservations, Estonia still preserved it. Even within the gen-

eral frame of the constitutional-democratic state the diversities were much greater than is generally known. Otherwise it would be unaccountable why the Czechoslovakian version of French parliamentarism worked smoothly to the end while the Polish adaptation of the same system broke down at an early date, or why the Weimar democracy collapsed in the Reich and the cognate Prussian system worked until 1932.

None the less, at a given time, particularly when several states are called upon simultaneously to redefine the principles of their political existence, a degree of affinity or homogeneity, though not of uniformity, is natural. A definite pattern is "in the air"; the laws of imitation and cultural dispersion extend also to constitutions.\* It is most likely that, after the experience with the power-drunk autocrats, the nations will fight shy of political experimentation and will lean toward practicality. Once the ideological "we or they" cleavage of the war period is bridged, the approximation of constitutional patterns will be spontaneous. By necessity the new constitutions will orientate themselves toward those political systems which have shown the greatest success either in carrying a nation to victory, or in enabling it speedily to reintegrate itself into the international community.

To be concrete: The democratic reaction against the autocratic past will be strong enough to give the pendulum a violent swing. The alternative forms of government for choice will be limited practically to political democracy and the Soviet system. Without anticipating,† it may be said here that all nations of Central Europe and most of Eastern Europe would prefer the former to the latter. Any attempt at uniformity would impede political reconstruction, which is complicated enough because democracy admittedly is the most difficult form of government. For its mechanism of interlocking transmission belts of authority and responsibility, making possible the interplay of leadership and democratic consent, no foolproof single solution has as yet been discovered. Each

\* See *infra*, pp. 317 ff.

† for a discussion of this problem on its merits, see *infra*, pp. 309 ff.

nation must work out its own methods of political salvation. Hence the scheme of constitutional universalism in the form of a generally applicable model constitution is clearly utopian.

#### THE "NUCLEAR DEMANDS" OF POLITICAL DEMOCRACY

It is precisely the great variety of institutional arrangements through which the constitutional-democratic state operates in practice, that requires an analysis of its essential structural elements, described here as the minimum standards or the "nuclear demands" of political democracy. While they should be sufficiently elastic to permit adjustment to national conditions, they must be sufficiently definite to circumscribe the essential and indispensable content of political democracy. Any political organization in which one or more of these essential elements are missing, fails to satisfy the definition. It should be emphasized here that these minimum standards are tabulated without any ambition to delineate the postulates of the "ideal" state or the "best" state. Actually they codify only the content of most prewar democratic constitutions.

##### (1) *The Written Constitution*

The primary requirement of political democracy is a written constitution, popularly enacted and popularly amendable, embodying the limitations of political power, known to all and easily ascertainable by all.<sup>2</sup>

##### (2) *Suffrage and Vote*

Next in importance for democratic reconstruction comes the suffrage, or right to vote. To the masses liberated from foreign enslavement or internal bondage, the vote is the symbol of freedom, the token of regained self-respect and dignity. The voting system must be left to the discretion of the individual states. Electoral laws must conform to the traditions of the national environment. But the minimum standards of political democracy demand that the suffrage be equal (excluding distinction between classes of voters), direct (eliminating the utterly useless and intrinsically undemocratic

technique of electoral colleges and similar evasions of responsibility), secret, and possibly universal (implying that it should be equal for men and women<sup>3</sup> and be granted at the age of reaching maturity and reasonableness). In addition—a caveat drawn from the experience of the period of ultrademocratic optimism after the First World War—the electoral system must be uncomplicated, in order to allow an honest articulation of the popular will. F. H. Hermens untiringly and convincingly has demonstrated that no single technical factor has contributed more to the perversion of the constitutional state into Caesarism than proportional representation.<sup>4</sup> The alleged accuracy in reflecting the political parties in the composition of the representative bodies was dearly, too dearly bought by alienating the voter from his function and by frustrating the formation of a stable government and, thus, atomizing the unity of the political will.

### (3) *Representative Institutions*

The third of the minimum standards of political democracy is establishment and maintenance of genuine representative institutions to give effect to the popular vote. The technique of representation—unknown to the ancients, and first used for social integration in feudal-agricultural societies—is indispensable in our mass society. Without straightforward and undiluted representative institutions political democracy cannot exist. Such methods of direct democracy as referendum, initiative, and recall are not excluded, but their value is auxiliary at best. However, representative bodies are not institutions of government; they should not, because they cannot, govern. Their main utility and function in a political democracy is the control of the government.

Another caveat is in order here. Authoritarian and even dictatorial regimes have not altogether and invariably discarded voting techniques and representative institutions. On the contrary, “councils” either wholly appointed, or elected on a highly selective franchise, are as characteristic of dictatorships today as they were of Napoleon I. When confined to

privileged classes the suffrage is undemocratic.<sup>5</sup> Likewise undemocratic are representative bodies which are wholly or partially appointed by the government. In the political democracy of the future neither the popular vote nor genuine representation should be obscured or emasculated by artificial pseudo-representative devices which, through the appointment and nomination of their members, amount in practice to the control of these bodies by the government. Appointment from above, camouflaged as "corporative" and professional representation, is the hallmark of most authoritarian regimes.<sup>6</sup> Representation without free suffrage and vote is no representation at all. This does not imply, however, that techniques of professional representation are wholly excluded in a political democracy; as subsidiary and complementary means of political representation they may well have a future in a period in which social rights will be as important, and perhaps more so, than political rights proper. Unmitigated territorial representation may well call for implementation by professional organization. Such devices are incompatible with the tenets of political democracy only when utilized exclusively or preponderantly to express the popular will. Wherever in postwar constitutions appointive or corporative institutions make their appearance, they should be received with caution and distrust, as the entering wedges of dictatorial and authoritarian trends.

#### (4) *Popular Control of the Government*

The fourth and perhaps the cardinal structural principle of political democracy is that the government be placed in office by the people, directly or through genuinely representative arrangements, and that it remain accountable to the people for its conduct. The government not only represents the people and the state, but must be responsible to the people. Accountability and responsibility of the government to the people is the crucial issue of political democracy.

It is obvious that government by the people is—and always has been—a fiction. Even if it were technically feasible, it would not be desirable. Governing is a skilled profession.

Governing must be in the hands of professionals—whom we would call politicians, had not the term become an unsavory one in democracies. Governing is leading the people. Recognition of this inescapable fact brings into relief the necessity of control of the government by the people, and of responsibility of the government to the people. Control and responsibility are interdependent. Democracy, like any other form of government, is operable only through developed techniques of leadership and control. It is precisely the requirement of reconciling leadership with control which makes democracy the most difficult form of government. Leadership in an authoritarian or dictatorial state is uncontrolled and therefore beyond responsibility. In a wisely constructed democracy the government must be permitted to do what is its task, purpose, and duty; namely, to govern. But simultaneously the people must be given the power to change the leaders by orderly procedure and without violence, and thereby the governmental policies. Too much control and too little leadership leads into anarchy, as evidenced by the agony of the French parliamentary regime. Too little control and too much leadership prepares and accustoms the people to authoritarian rule and dictatorship. However, never can the equilibrium be established by institutional devices alone. No automatism of institutions can convert intangibles into realities. To lead the people is to be led by them. It is the reciprocity of trust and confidence which makes government more than a usurpation. Only in this figurative sense is popular sovereignty any better than a myth.

The methods of rationally establishing and maintaining control and responsibility differ widely in the different systems dedicated to political democracy. What Pareto calls the "nonlogical" manifestations of the public will, public opinion and its free articularization, political parties, the right of opposition (which to Ferrero is the essential corollary of democratic legitimacy), are transmission belts on which responsibility and control travel back and forth between the government and the people. But they were so diabolically abused by the dictators that they cannot be relied on in the future with-

out concrete and tangible institutions; rationalized methods of consent or disapproval are required. The best device at our disposal is the election, conducted honestly on the basis of an honest suffrage, to decide on persons to lead, on parties to be in power, and incidentally, on policies to be followed. Since such controls operate only at predetermined and not too frequent intervals—overfrequency of elections blunts their edge—they are less elastic, less ever-present and, therefore, less effective than responsibility enforced through parliamentary control, by vote of confidence and nonconfidence, rejection and adoption of measures and policies, individual challenges and the responses they evoke. Herein lies the differentiation between the presidential and the parliamentary system of political democracy, and the latter again develops different patterns in accordance with which dissolution of the parliament leads to the verdict of the people, and absence or obsolescence of dissolution provokes the unworkable system of parliamentary supremacy. The indissoluble parliament was the biggest nail in the coffin of the French Third Republic. Political reconstruction after the war would greatly profit by finding national solutions in the light of comparative experience.

Another caveat is in order here. Only if the interrelationship between responsibility of the government to the people and control over the government by the people is properly understood can the relapse of a nation into Caesarism or authoritarianism be avoided. The election, by universal suffrage, of a leader for an inordinately long or indefinite period would remove or invalidate the effective technique of continued popular control. Political democracy requires either repeated confirmation in, or rotation of, office.<sup>7</sup>

##### (5) *Political Parties*

Another minimum requirement of political democracy is the existence of more than one political party. Never in history has national unity become so intense as to eliminate the natural diversities of public opinion. The single-party system of dictatorships—the most effective device for carrying totali-



tarian control into everyday life by an unlimited supply of voluntary party officials—was accomplished only by coercion. Nor can the fortunate historical two-party configuration in Anglo-Saxon countries be expected to evolve in other states not accustomed thereto. Herein lies one of the intrinsic reasons for the geographical and ethnical limitations of the British parliamentary system. Individual self-determination will always result in political diversification organized in groups and parties. Multiplicity of political parties is commonly considered as the basic and most deleterious vice of democracy operating through parliamentary representation. Quite the contrary is true: it is a sign of healthy vitality in a people, an indication of its interest in the state, reflection of its will to partake of political solutions. Moreover, diversification of opinion in political parties permits rationalized opposition, and opposition is the most essential method of control by a people over its government. Consequently, political democracy must not repress the natural dynamism manifested in the multiplicity of opinions and parties. One of its basic operational principles is the right of individuals to organize into parties. However, in a particular political environment, it may be found advisable to protect the stability of the government by taking steps to forestall atomization of the national unity by an excessive number of “splinter” parties. In this mass society of ours only substantial fractions of the popular will are entitled to political representation. It should be relatively easy to set reasonable restrictions on the formation of political parties.

#### (6) *Liberties Constitutionally Guaranteed*

The final minimum requirement of political democracy is the existence and effective exercise of individual liberties and constitutional guarantees normally incorporated in the pattern of the liberal bill of rights. Constitutional guarantees, intangible for the state, are the climate in which alone free institutions can thrive. This restatement of classic liberalism may sound old-fashioned or naïve to those whose essential liberties

at no time were seriously endangered. To the common man in Europe, released from a concentration camp under a dictatorship, resurrection of the rights of free man will constitute the elixir of political life. It is not ignored that the society of the postwar period will tend more towards a social than a political rights democracy. Of the Four Freedoms, protection from want and from fear will greatly overshadow the right to speak freely or to worship without hindrance. It will take time for the common man to recuperate from manufactured public opinion and totalitarian regimentation. He will have to learn anew how to use his rights. But in the political democracy of the future individual liberties are the spokes of the hub, the lifeblood of all free institutions, the fuel of the machine of the body politic. Their gradual restoration must be the indicator of the return to political self-determination. Stripped of all rhetoric to which the emotional nature of the subject tempts, the right of individuals to be free, within the limits of the freedom of others, is the essential core of the modern state as it has been evolved by the inscrutable fusion of the different elements of Roman law, Christian morality, the philosophy of the Enlightenment and the experience of the French Revolution. One can be opposed to liberal prejudices and yet be an incurable individualist. One can be aware of the inescapable prospect that the coming era of rationalized social integration, economic planning, and administrative control of cooperation will put a heavy strain on the ideals of individualism, and yet believe that this war is fought to rescue the values of individualism from the totalitarian Leviathan.

Restated in the briefest possible terms, the constitutional guarantees and liberties essential for the operation of political democracy are as follows: <sup>8</sup> freedom of expression, of information, and of access to the instrumentalities of expression; freedom of individuals to form and hold political opinions and to associate and organize with others for their realization; freedom to participate in the government through democratic elections and other manifestations of the popular will; free-

dom to run for political office and to assume it if properly elected or appointed; protection by independent courts in the exercise and the enjoyment of these rights.<sup>9</sup>

In their totality these freedoms constitute what shall be called here, for want of a better term, "the right to participate in the government of one's state." As far as can be seen, no bill of rights yet has included such a specific political right. Generally, participation in the government is relegated to the frame of government which contains the special institutional arrangements for the operation of the state. At a later point in this book \* it will be demonstrated that this new political right is considered as the sheet anchor of political democracy of the future. If it is found impossible or impracticable to impose political democracy as a form of government upon any nation, it is suggested that a nation which subscribes to these rights cannot help choosing the only permissible form of government; namely, political democracy.

#### (7) *Protection of the Democratic Order*

Another caveat, however, must be added here. The premise of political democracy is that it is predicated on the freedom of political opinion and of political opposition. But it is only logical to insist that these freedoms shall not be abused for antidemocratic purposes and with activities directed against the fundamental democratic premises themselves. One should not delude oneself into believing that totalitarianism will have disappeared after the regimes have fallen which rode into power on the crest of the antidemocratic wave. Anti-democratic forces will persist in the defeated nations though they will relabel and camouflage themselves with the skill acquired in long years of under-cover political warfare. In allowing such forces to regroup themselves and to gather new strength political democracy would commit suicide. It will endure only if it becomes militant.

The most cursory retrospect on the period between the two world wars will bear out this conclusion. The Weimar

\* See *infra*, pp. 364 ff.

republic is the most conspicuous illustration. Totalitarian dictatorship arose not because of the satanic power of superior leaders—after all, genius is limited in numbers even among the strong men of our period—but because a lenient and generous liberal democracy granted the same political rights to movements, parties, and persons that were admittedly anti-democratic as to those faithful to democratic principles. Anti-democratic opinions and activities, although denying democracy the right to exist, were carefully protected by impartial democratic institutions. Not even the blunt admission that, once in power, they would destroy democracy—a promise literally kept—barred totalitarian parties from parliamentary bodies which they openly despised. In masochistic frenzy the voters flocked to the banners of the totalitarian pied pipers who vowed to raze democracy to the ground. The results were internal barbarism, government by firing squad, international anarchy, aggression and global war.

This must not happen again. Political democracy can no longer tolerate political groups, parties, movements whose admitted or implied aim is to annihilate it. The inescapable lesson of the past is that political democracy must rigorously deny its enemies the democratic privileges. To permit the antidemocratic forces to utilize democratic institutions for their destruction, is the very negation of political democracy. Political rights, like all individual rights, find their natural limit in the rights of others. Those who would destroy them have no legal or moral claim to be protected in their right to destroy.

Obviously here appears a conflict with a basic tenet of liberal tradition, held to be as sacrosanct as the duty of non-intervention in the internal form of government of other nations. Freedom of opinion, it is asserted, does not permit that a particular kind of opinion be excluded therefrom. If discrimination is admitted, where is the line of demarcation between an "undemocratic" opinion and an opinion disliked for other reasons by the government or the majority of the people? How would the minority be protected under such discrimination? <sup>10</sup> The dilemma is a real one. But the solution is found

by an analysis of the techniques—not of the ideologies—of totalitarian conquest. Nowhere would totalitarian dictatorship have implanted itself had not its mass propaganda been supported by its mass organization. The technological secret of the totalitarian success was the masterful combination of propaganda against democracy and organization to take power away from democracy. The loose and fluctuating political parties of the democratic state were unable to compete with the appeal and fighting power of militarily disciplined totalitarian movements under the leadership principle. The new technology of political conquest did not require a resort to violence in order to overthrow the legally constituted government. In the light of mass propaganda and mass organization the democratic defense mechanism, based on overt acts of sedition or treason, became obsolete and ineffective. Mass propaganda aiming at mass organization, and mass organization mobilized by mass propaganda, were beyond the pale of the criminal codes. Liberal democracy considered them as legal.

The realization of the totalitarian technique cannot but lead to another minimum standard of political democracy of the future. It must become militant. Its principles and institutions need conscious legislative protection against its internal enemies. Antidemocratic propaganda as such may still be protected by freedom of political opinion, but only as long as it abstains from consolidating itself into an organization for the attainment of its aims. The alliance between mass propaganda and mass organization must be dissolved. Antidemocratic propaganda cannot be permitted to condense itself into an antidemocratic power mechanism. Consequently, while freedom of political expression need not be withheld from antidemocratic groups, they must be denied the right of organization and participation in the government. In a democratic state their members must be ineligible for election or appointment to office. This is how the liberal dilemma resolves itself. If antidemocratic propaganda is deprived of the chance to organize itself as a political party for the ultimate conquest of political power, it becomes largely ineffective, because its mass

appeal lies in the hope of attaining power through mass organization.

The dialectics of history impel political democracy to profit by the experience with the dictatorships. War and the emergency situation have rendered such self-defense of militant democracy less obnoxious than it would have seemed in the liberal era. There will be no return to normalcy for a considerable time. The degree of control to which political democracy will have to resort will vary according to national traditions and the stability of the democratic institutions; but it is not likely that any national application of political democracy of the future will wholly dispense with militant protection of its own order. Equipping itself, besides, with the instrumentalities of an intensive social direction and economic management, the constitutional state of the future will have to conform more to the pattern of the "disciplined" or "controlled" democracy than in the past.

#### THE LIBERAL ARGUMENT REEXAMINED

We are now in a better position to reexamine the liberal argument that the forms of government of other peoples do not concern us, or the international community. Narrowed down, in the preceding discussion, to the exclusion of autocracy—that political system in which the people neither participate nor control—it has lost much of its character as a sweeping generality: a nation may be free to choose any form of government except autocracy. "Political democracy" is a generic term. It does not imply a model constitution mandatory to all states. No specific form of government is prescribed beyond the requirement that it conform to political democracy. Its minimum standards are wide; its frame of reference is elastic enough to accommodate practically any variation, and all varieties, of constitutional government. Within its recognized limits fall (to name only the principal applications): the parliamentary form of government, exemplified in the constitutional monarchy of Great Britain and the Dominions, and the Western and Scandinavian monarchies in Europe; the presi-

dential system with separation of powers, exemplified in the United States and most Latin-American countries; the directory organization of government combined with direct democracy, exemplified in Switzerland; the type of parliamentary supremacy over the government that existed in prewar France and a number of Eastern European states. Nations subscribing to the "nuclear demands" of political democracy retain the right to adopt such institutions and techniques for making the popular will prevail over the government as they may prefer. Every nation is free to mold its political order in conformity with such standards, tests, and arrangements as may correspond to its national traditions, habits, and requirements. Every known variety of democratic government satisfies these requirements. No authoritarian or dictatorial form can satisfy them, and hence none is permissible as a choice. Since no specific or definite democratic form of government is enjoined, internal self-determination and sovereignty are limited only—in the interest of the community of nations as well as of each nation—by the prohibition of nondemocratic government, be it chosen freely or reached by stealth.

These observations tend to attenuate if not to invalidate the liberal argument of noninterference with other peoples' forms of government which commonly appears in the slogan that it would do no good "to ram down the throats of other nations our form of government." Although around its core have grown many layers of tradition, propaganda, stereotypes, national prepossessions, oversimplifications, a critical analysis will help to bring out the reasons for the continued acceptance of the dogma.

At first sight the "hands off" policy toward the internal affairs of other nations reveals itself as the pragmatic reflection of liberal tolerance and skepticism to which all things human are relative, a respectful recognition of indeterminism, which allows the exercise of free will to all whom the Creator has endowed with it. Liberalism religiously believed, and still believes, in consent, irreconcilable with even the most beneficial compulsion. Underlying it is the liberal credo of optimism and

progress which holds that nations, like individuals, will work out their salvation best if left to their own devices.

But if we probe deeper the argument, persuasive as it may seem, turns sour. Liberalism, victorious over feudalism, lost the missionary impulse which, to the benefit of mankind, originally made it as militant as the totalitarianism of our age. It became static. It left a spiritual and moral vacuum which has driven untold millions into a more dynamic, more activist faith: totalitarianism. Liberalism is no longer a fighting faith. Understanding and condoning everything, it will not battle for anything, not even for its own survival. The flame of enthusiasm has been extinguished. *Laissez faire* and tolerance degenerated into irresponsibility, selfishness, indifference, intellectual isolationism, narrow nationalism, world anarchy. Said Goethe, the humanitarian poet:

"Ihr lasst den Armen schuldig werden.  
Dann überlasst ihr ihn der Pein." <sup>11</sup>

Moreover, the liberal argument of political noninterference has a definitely Anglo-Saxon flavor; it should not be forgotten that it originated almost simultaneously in Great Britain and the United States. Anglo-Saxon peoples would indignantly refute the allegation that their forms of government are not best suited for them. No Britisher—except the stray crackpot who adorns even that realistic nation—would dream of exchanging his system of government for any other. This holds true also for us—intellectually the most provincial people on earth, with some reservations. An increasing number of persons who have cast off the national myth of the perennial sanctity of the American Constitution and the form of government embedded therein are becoming uneasy about the rigid separation of powers which, in case of dissension between the executive and either or both of the houses of Congress, resolves itself into an irritating succession of frictions and even deadlocks. As a remedy it is proposed to inject some elements of the British system into ours.<sup>12</sup> But in general Anglo-Saxons do not indulge in political proselytizing or in-



tellektual imperialism. They are inclined to believe, from ignorance or from indifference, that other peoples' governments must suit them as well as their own do them. Neville Chamberlain's calamitous exclamation about Czechoslovakia, "that far-away country about which we know little," glaringly revealed the utter callousness and irresponsibility toward other peoples' affairs in a nation which looks back on nearly three hundred years of world power. It is unlikely that a Roman consul would have dared to admit that his government was not interested in the internal situation of Iberia, Cappadocia, or Illyria.

It is noteworthy that such complacency and indifference are not found on the European continent. Europe since the French Revolution has had an unbroken series of constitutional experiments, and most of the continental nations are still groping for the definite political incarnation of their national genius. Few Europeans pretend to have found the only suitable solution for themselves. It is precisely the claim of the totalitarian dictators that they had established autocracy as the "natural," congenital, and final form of government, which made Hitler's "New Order" so utterly unpalatable to men forced into it. The curious attraction of the British parliamentary system, irreproducible as it may be elsewhere, is based on the belief that what is good for the British may be as good for other nations. The politically younger nations of Europe are looking for guidance to their older sisters—surer of themselves, more skilled in self-government. We should be inexcusably remiss if we withheld such guidance under the pretext that we could not "force down the throats of other nations our form of government." Rarely if ever will the nations of Europe be so receptive to guidance, persuasion, direction, and political planning as after this war, even if the upsurge of old-fashioned nationalism with insistence on unrestricted sovereignty overshadows the inference of foreign experience. Trying to get their political bearings after the liberation, they will discover that they have experimented with unrestricted democracy as well as unlimited dictatorship and have found

both of them wanting. Why should the more advanced democratic nations be reluctant to sell their superior product to nations whose political stock has been exhausted?

Finally, the complacent attitude that another people's form of government is none of our business is frequently supported by the common prejudice that some nations are naturally more addicted to authoritarian government than others, and hence are congenitally unsuited for political democracy. This facet of the liberal argument is as specious as it is fallacious. It has been shown \* that no people—not even one with the reputation of incurable power-worship—ever has freely submitted to autocratic control. There is no people fundamentally and permanently averse to freedom, or, in President Roosevelt's fine words, doomed eternally to slavery by Providence. In all cases absolutism is a product of historical circumstances, an acquired and not an innate trait of nations. Change in political environment changes political mentality. The German genes are no different from those of other peoples. No people on earth, not even the German or the Japanese, is so depraved, so different from others that, given the opportunity, it would renounce its birthright of freedom in favor of tyranny and despotism. The counterargument is usually drawn from the Weimar republic, "the most democratic constitution in the world." So much is true: in the elections of 1932 about two-thirds of the voters chose a nondemocratic form of government, either Nazi or Communist. But the Weimar constitution was not only a victim of adverse circumstances; it had the fundamental fault of harnessing ultrademocratic rights of the people to an intrinsically authoritarian arrangement of governmental powers.<sup>13</sup> Nor is the customary reference to the fate of the Spanish republic free from distortions. It could never have been overpowered had not Franco been supported by the military might of the dictators, who had no inhibitions against intervening against the governments of other nations when this fell in with their missionary aspirations. But the assumption that some nations, naturally leaning toward au-

\* See *supra*, pp. 112 ff.

thority and authoritarian government, would accept this even if they had the right to oppose it, would make the argument that some nations are unsuited for political democracy a mere *petitio principii*. If the democratic gospel were for the initiated alone, and the lesser breeds must forever remain in the darkness of absolutist superstitions, then there would be no basis for the democratic faith in the educability of the human race.

Noble and persuasive as political *laissez faire* appears to be, it must be jettisoned if we wish to ascend to the higher level of an integrated international order. Indifference to the forms of government of other nations blocks the path to the future. It must be broken down, and its fragments must be cleared away. Autocracy had its full day in court and stands convicted before world opinion. Hecatombs of innocent men, destroyed shrines of human culture, devastated cities testify to this. Victory is a forceful argument in the contest of political values. The responsibility of the victorious nations no less than the welfare of all nations demands imperatively that the opportunity of political reconstruction after this war be made the occasion for outlawing internationally autocracy and making political democracy wherever the United Nations have the power, the mandatory form of government.

#### ILLUSIONISM OR REALISM?

At this point the sophisticated reader, who has followed the winding path so far, has the inalienable right to wax thoroughly impatient with the recapitulation of a democratic fundamentalism which may appear to him to be antiquated. The leading analysts of political democracy, from Montesquieu and the *Federalist*, Condorcet and Guizot down to the sociologists Ostrogorski, Mosca, Pareto, and Max Weber, were imbued with the skeptical conviction that social forces mold political institutions and not *vice versa*. Rousseau himself once had declared that democracy if ever it could be realized would be fitted only for the government of gods, and our contemporary Machiavellians diabolically gloat over the triumph of

the autocratic Antichrist. The reader will ask: What, after all, is the "will of the people," on which this mirage of a democratic *risorgimento* is predicated? Is it not a mere figment of the imagination, at best a working hypothesis? Those myriads of conflicting interests which constitute the phantom public opinion—can they be brought at least sporadically to a common denominator, indispensable to achieve national unity? Is not the merciless and incessant strife of the organized pressure and power groups—trade unions, big business and cartels, farm blocs—and of vested interests of bureaucrats the reality of the democratic existence? How can one have confidence in "representative" institutions, knowing that they are run by the "elite" of party bosses and the greedy politicians, and that the few unselfish men are outnumbered by the marionettes controlled from behind the scenes by powers eager to get into the public trough? How can one expect intelligent choices by the "common man," who, separated from political reality by indestructible party machines, is merely cannon fodder in the battle of interests? Does not the immense complexity of political issues require professional knowledge and technical judgment, without which the voter cannot cooperate intelligently? How can the "people," *belua multorum capitum*, exercise responsibility when the common man can hardly hold his own? How will it be possible to reconcile leadership and control, without new regimentation and compulsion? How will democratic fundamentalism stand up against the new technology?

All these questions—and they could be multiplied endlessly and phrased much more poignantly<sup>14</sup>—require honest answers. The advocate of political democracy has no reason to yield to his readers in sophistication or skepticism even though he may be less well read in the gospels of Machiavellianism. But his answer is as unmitigated and unchastened as Galileo's apocryphal "*Eppur' si muove!*" There is a point where the most logical argument or counterargument becomes irrelevant because it touches the sphere of irrational faith. Democracy moves and progresses—it does progress—by trial

and error. To have erred in the past does not invariably mean that the same error must be committed in the future. There is no other solution than to try again. There is no other key than faith in democratic legitimacy. Ferrero's optimism is preferable to the cynicism of the Machiavellians. There is no other salvation than to make the people custodians of their own freedom. The last decade has depleted the repertory of nondemocratic answers to the tormenting riddles of their existence. The cycle of governmental forms has snapped back to the democratic segment. It cannot be that the experience with strong men and their technicians, with compulsion of self-appointed "elites," with the mystical rigmarole invented by gangsters and crooks for their self-protection has taught the nations nothing. Somehow the ordeal of the last decade must have left its mark. Somehow the lesson must have been driven home. ✓ The acceptance, at least temporary, of international responsibility for the internal affairs of certain nations and the establishment of affinity of form of government as the prerequisite of the coming world security system is cheaper than a Third World War.

*Part Three*

DE MONARCHIA, MODEL 1945

## CHAPTER I

### *The Area of Monarchical Restoration*

#### RELEVANCE OF THE ISSUE

If the fathers of the Atlantic Charter, probably mindful of the traditional division of governments into republics and monarchies, were prepared to have a people choose monarchy, it must be explored whether monarchy, in terms of the distinction developed here, corresponds to political democracy, the permissible form, or to autocracy, the nonpermissible form. Monarchy, like political democracy, is a generic term including many variants. Surprisingly there is no penetrating, sociologically orientated study of monarchy today. With the sudden eclipse of the institution in the Central European empires and in Russia the subject seems to have lost, not only its importance to the world, but its interest to political scientists. What was written in 1936 on the British monarchy when the British grimly exchanged a "bad" for a "good" king, was at best of local interest. The new Dante has not yet arisen. To fill this gap is not intended here. But even the limited aim of evaluating monarchy in terms of permissible and non-permissible forms of government cannot wholly dispense with the historical background, metaphysics, and metamorphosis of what is the oldest and seemingly the most permanent political institution known to mankind.

The problem is by no means academic. Victorious Britain is a monarchy, and hence is favorably inclined to the preservation of monarchy upon the earth; and most of the govern-

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See pp. 441-445 for footnotes to this chapter.

ments-in-exile of the United Nations were monarchical in structure. In some of these monarchy as a form of government is under heavy fire. Monarchs-in-exile have developed into pressure groups. "Free movements" propagate the maintenance of monarchical establishments where they existed prior to the Nazi invasion. Moreover, among nations which, formally republican when the Nazi juggernaut crushed them, had been monarchical in earlier times, the adverse experience with both democracy and dictatorship cannot fail to revive interest in monarchy as an alternative. The issue of monarchy has become more vital in Europe than at any time since 1918.<sup>1</sup>

#### THE AREA OF MONARCHICAL RESTORATION

##### (1) *Western Europe*

In Holland, Belgium, Luxembourg, Norway, and Denmark, the continuation of the constitutional and parliamentary monarchies as they existed before they were overrun by the Germans is not in dispute. Neither the principle nor its technical realization is challenged. The governments of Holland, Luxembourg, and Norway with their rulers moved to friendly Allied soil, in full working order, to return to home territories after the complete liberation. In occupied Belgium and Denmark, where the wearers of the crown became captives of the Germans, the two peoples adhered to the monarchical system with a near-unanimity rare in matters politic. Republicanism before the war was of little significance in these countries. Kingship rises from the ordeal of foreign occupation with a markedly increased prestige which will have repercussions on the institution elsewhere. Nazism, far from having weakened the monarchical idea, has lifted it from a somewhat drab and pedestrian acceptance as tradition and habit to a dynamic awareness of its value. It must be conceded that the monarchs have stood the test of time. They have personified resistance to the evil and have symbolized national cohesion and integration. The Danish king's spirited and courageous stand against the invaders made him a legendary figure during his



lifetime. In the case of Leopold III of Belgium final judgment must be reserved until all facts are known, except that he is absolved from betrayal of the Allied cause<sup>2</sup> in the capitulation of the Belgian army in June, 1940, and that, during his captivity, he has not failed his people by collaborating with the enemy. In general the monarchical system in the five western and northern countries appears to be problematic only in the purely technical sense of restoring monarchy to the plenitude of its constitutional functions after liberation.<sup>3</sup>

The first countries of monarchical structure to be liberated were Luxembourg and Belgium. Grand Duchess Charlotte was reported to be ready to follow the government-in-exile in its return home in September, 1944, but the absence of King Leopold made necessary a Regent in the person of his younger brother Charles, who was elected by the Belgian parliament on September 20, over the opposition of a substantial minority.<sup>4</sup>

## (2) *Italian Monarchy*

The monarchy in Italy—a defeated Axis nation, although public opinion abroad quickly, too quickly, seems to have become oblivious to the fact—occupies a different position from that of the Western monarchies. If there were the most primitive sense of justice in history King Victor Emmanuel III and the dynasty of Savoy would have been ejected by the Allies at the first opportunity. The King had identified himself and the crown with the Fascist regime from its inception. At no time did he—or the royal house, for that matter—kick against the Fascist pricks. In the initial stages, by refusing any part in the Fascist outrages and threatening to resign, the King in all likelihood could have ended the Fascist nightmare. Hardly another ruler in modern times has broken his oath so continually and consistently. Even a superficial knowledge of Fascist constitutional law reveals that Mussolini's most notorious crimes against civilization became law over the King's signature.<sup>5</sup> Twenty-one years of compliance can only be considered as connivance with the totalitarian dictatorship, and none expressed it more forcibly than Arturo Tosca-

nini, who, in response to a plea of the Italian Committee of Liberation to return to La Scala, wrote:<sup>6</sup>

Justice demands that the one who gave to the Fascist tyranny all material and moral support, the arms and the legal power to deceive, subjugate and oppress the Italian people for twenty sorrowful years, be now called upon to answer for his complicity in the crimes perpetrated by the Fascists in his name and for all the violations of the statute which made the Italian people the first victims of Nazi-Fascist terror. . . . I shall be happy to return among you as a citizen of a free Italy and not as a subject of the degenerate king and the princes of the House of Savoy.

But Victor Emmanuel, who during an inordinately long reign that began in 1900 weathered many a storm, played his cards shrewdly, subtly supported by the British and other royal houses for reasons of dynastic affinity. The continued recognition of the house of Savoy in the peace negotiations was a grave error in judgment. A republicanized Italy's share in the war effort could hardly have been smaller than that of the royal Italian army has been. The curious fact that Italy since the unification has always been soundly trounced on the battlefield and yet has managed to be on the winning side of the peace table has its counterpart in the fact that a monarchy heavily tarred by the brush of Fascist misrule and corruption will in all likelihood manage to survive. Victor Emmanuel, in conformity with the pledge given to the Allies by Marshal Badoglio after the liberation of Sicily, resigned in favor of Crown Prince Umberto, "Lieutenant General of the Realm," or Regent, immediately upon the Allied armies' victorious entry into Rome, June 4, 1944; but he retained his full title and prerogatives—a pseudolegal sleight-of-hand of unusual subtlety which would permit him to step into his previous position any time the situation might be inviting enough. The first provisional government—formed that month by the six democratic "Liberation" parties (including the Communists) under Ivanoe Bonomi, a veteran of the democratic past—showed reluctance to take the oath on the constitution or to the Regent, thus foreshadowing a constitutional reform after

the war which may, or may not, bring about the elimination of the monarchy.<sup>7</sup>

At the time of this writing too little is known about the political condition of northern Italy—with its large body of organized labor and its enlightened bourgeoisie—after the war to allow definite conclusions. But monarchy in Italy seems to have more than a fair chance of ultimate survival. It is possible that a plebiscite of the Italian people will be held upon the issue of monarchy versus republic. Would the crown yield to a popular verdict against it? Would the United Nations for once cast aside the tradition of nonintervention in other peoples' internal affairs in order to enforce such a verdict against the crown? But even if a plebiscite is held—an honest one, in a country habituated to Fascist election frauds for a good many years—its outcome is almost a foregone conclusion. Republican sentiment has never been strong among the Italian masses—not even among the Socialists, who, however, never equaled their German comrades in subservience to the throne. Certainly it is much stronger now. But can republican sentiment assert itself when the crown regains full control of the administrative machinery? Royal officials would supervise the vote; the aristocracy, socially more important in Italy than in many other European countries, is royalist—an antiroyalist grandee like Count Sforza is an *avis rara*. Relying on the thoroughly monarchist sentiment of the army officers, the support of the Holy See and the conservative higher clergy, the hereditary opportunism and cynicism of the bourgeoisie, and the heavy propaganda of the Monarchical Union party, the monarchy can await the result of a plebiscite with equanimity. Assiduously the legend is promoted that it was the King who ousted Mussolini.<sup>8</sup> The house of Savoy is remembered for its services in the unification of the country; and it climbed in time onto the band wagon. Moreover, family connections and dynastic solidarity bind it to other royal houses, naturally eager to see their numbers no further depleted. The cards, then, seem to be stacked against a republic. Indicative of the trend is an interview which the "Lieutenant General," without au-

thorization of the Bonomi government, gave in November, 1944. The house of Savoy wishes to have the issue decided by a plebiscite and not by the future constituent assembly, well aware that the ignorant masses with their traditional adhesion to monarchy would give it a majority of the votes while the decision of the parliamentarians would be less predictable. Nobody would blame a prince for thinking more of his dynasty than of his people. But the Allied governments should never have permitted him to make any statements prejudicial of the issue.

One may deplore the prospect;<sup>9</sup> but Italy has oscillated, from ancient times on through the Middle Ages, between republicanism and princely absolutism, and her destiny may not yet be republicanization. All that can be hoped is that monarchy, having paid for preservation with an unavoidable loss of prestige and power, may develop along the lines of Western constitutionalism. Perhaps in a new Italy, with a sound equilibrium established between agricultural and industrial interests (much of Sicily and southern Italy is still semifeudal), a chastened monarchy would be a fairly adequate form of government.<sup>10</sup>

### (3) *The Balkan Monarchies*

(a) COMMON FEATURES. Prior to the German invasion the Balkan states of Greece, Yugoslavia, Rumania, Bulgaria, and Albania were monarchical. Among their common features were that in none of them was the monarchical idea so firmly planted as it was in Western and Northern Europe; that all the dynasties were of recent origin and did not enjoy universal allegiance; that all the states were either dictatorial or authoritarian when overrun by Hitler. The only indigenous dynasties were in Yugoslavia, where the Karageorgevich had come to power by an appalling series of assassinations of the rival house of Obrenovich (1903), and in Albania, where, after the unfortunate experiment with the imported Prince of Wied (1914), power was seized by a native clansman, later styled King Zog. In the other states the dynasties were imported from Germany, the

department store of dynasties; in Greece (1863), the Danish-German house of Glücksburg; in Rumania (1866), the house of Hohenzollern-Sigmaringen; in Bulgaria (1887), the house of Coburg. All the "legitimate" rulers had to go into exile, except young King Michael of Rumania, who remained less than a figurehead under the military dictatorship of the German puppet government of Antonescu, and the infant son of King Boris III, who after his father's assassination in August, 1943 (for as yet unknown reasons), was named Simeon II, under a pro-German Regency. None of the rulers, whether exiled or at home, could expect to regain royal powers after the liberation of his country without encountering serious difficulties. One should be on guard against glib assertions that the mass of the Balkan peasants are too ignorant and too poor to care much who rules them. In spite of their relatively high illiteracy and the centuries of exploitation by their ruling classes, they are politically intelligent. All competent observers agree that the masses of farmers, honest, hospitable, upright, freedom-loving, confident in poverty of their future, are admirable timber for a successful democratic state, provided that long overdue agricultural reforms give them a modicum of economic security. Almost everywhere in the Balkans one finds a strong social tradition of democracy. Their democratic instincts may as well be mobilized in the future for self-government as were their nationalist emotions in the past by the greedy power cliques of the ruling oligarchy. The spontaneous resistance movements in most of these countries are reported to be as thoroughly democratic as they are anti-royalist; nor has the strong Communist element among the resistance groups any use for the rulers who have signally failed their people. The tug-of-war within the various governments-in-exile since their inception strongly indicates that the rulers and the court camarillas do not see the need of a return to constitutional government and genuine democratization in order to save the dynasties.

A full review of the situation of monarchy in the various Balkan countries cannot be undertaken here. The following

observations must suffice, therefore, to underline the general trend.

(b) GREECE. Greece's history since the liberation from the Turks in the 1820's has been as hectic as that of any Latin-American country.<sup>11</sup> For the last twenty-five years and more the country has been torn by the issues of monarchy, republic, and dictatorship in rapid succession. In addition, Greece is the only European country with a strange preference for the plebiscite as a means of determining the form of government.\* After the interlude of the Bavarian house of Wittelsbach the Glücksburg dynasty was introduced in 1863. King Constantine, removed by the Allies in 1917 because of his pro-German attitude, was recalled in 1920 by an "overwhelming" majority in a plebiscite, but forced to abdicate in 1922 after the military disaster in Asia Minor against the rejuvenated Turkey of Kemal Pasha. His son George II, the present ruler, was exiled in turn on December 18, 1923. Another plebiscite in 1924 favored a republic. After the Pangalos dictatorship the republican constitution of June 2, 1927, was promulgated, only to be thrown out on October 10, 1935, by the military dictatorship of Kondylis, which substituted for it the monarchical constitution of May 23, 1911.<sup>12</sup> Another "overwhelming" plebiscite, staged under martial law on November 3, 1935, recalled King George after an exile spent mostly in Great Britain. That a majority of 99 per cent for restoration meant nothing was evidenced by more honest elections for parliament on January 26, 1936, which resulted in a complete deadlock between the royalist and the republican (Venizelist) parties, the former obtaining 143 seats and the latter 142 (among them 15 Communists). In August, 1936, the King, flagrantly violating his oath on the constitution and the solemn pledges upon his recall the year before, suspended the constitution altogether, dismissed the parliament, and installed the military dictatorship of General Metaxas—a Greek variety of fascism, as cruel, ruthless, lawless and hated by the people as any contemporary autocracy.<sup>13</sup> Even if Metaxas himself,

\* The problem of the plebiscite is discussed on its merits *infra*, pp. 282 ff.

in resisting the Italian invasion (April, 1941), expiated some of his dictatorial sins, the Greek people did not forget that the King fully identified himself with the fascist dictatorship. The mutiny of parts of the Greek army-in-exile in Egypt (spring, 1944) seemingly in sympathy with the republican and antiroyalist resistance movements in Greece proper, bears witness to the deep dissatisfaction in even the corps of officers with the King's continued ascendancy and the distrust of his future autocratic plans.

It caused little surprise, therefore, that the British liberation army, after the final expulsion of the Nazis in November, 1944, found Greece in a turmoil of political dissensions with monarchy versus republic as the main issue dividing the resistance movements. One of them, the National Democratic Greek Army (EDES), supported by the King and the various governments-in-exile, is reported to be the refuge of pro-fascist reaction and to favor the return of the King and the maintenance of monarchy. The other, the National Liberation Front (EAM), whose military strength is concentrated in the ELAS, is opposed to monarchy and is under strong communist influence. Upon its return from Cairo to Athens (October 13) the Papandreou cabinet reorganized itself by including six ELAS members. But when the British government, justly suspected in view of Mr. Churchill's open support of the King of playing the game of the monarchists, demanded through the commander of the British army in Greece the disarmament of all guerrilla groups, civil war, which had been intermittent before, broke out in earnest; and it split both the Greek people and world opinion sharply into two irreconcilable sections. The issue was settled, at least temporarily, by a conference between Mr. Churchill and Mr. Eden with Greek leaders in Athens (December 26). A Regency was agreed upon under Archbishop Damaskinos which is to remain until a plebiscite can be held "under conditions of tranquillity." Mr. Churchill succeeded in overcoming the stubborn opposition of King George, who pledged himself to postpone his return to Greece unless recalled "by a free and fair expression of the national

will." Thereupon General Nicholas Plastiras formed a new cabinet in which some seats were left open for members of the ELAS.

This brief sketch allows the conclusion that a very considerable part of the Greek people, perhaps a majority, does not wish to see monarchy restored. The King, more because of a concatenation of circumstances than from his own choice, sided with the Allies and thus shares in the victory; but how heavily this ultimately will weigh in the balances against his connivance in the fascist dictatorship, can only be guessed. Even if a plebiscite brings the monarch back to the throne, the establishment is bound to have rough sailing with a nation which repeatedly has shown its preference for the republic. Unless the issue is settled to the satisfaction of the Greek people, without interference by British or other foreign interests, a dangerous fuse will continue to burn in a highly explosive area, threatening new international disturbances. At any rate, the Greek people seem ripe for political democracy, which obviously the present holder of the crown will not or cannot grant.

(c) YUGOSLAVIA. In Yugoslavia the monarchy is at least as insecure, though for different reasons.<sup>14</sup> The Regency under Prince Paul, after King Alexander's assassination in Marseille in 1934, was as authoritarian and nondemocratic as Alexander's royal dictatorship. Moreover, in spite of occasional vacillations, it was abjectly subservient to the Hitler regime. The young King Peter, as likable and well mannered as are most of the youthful pretenders of our day, cannot be blamed for failure to command the affection of his people, as democratic-minded as any in Southeastern Europe: the resistance techniques have kindled democracy among the Yugoslavs, as among all fascist-overrun peoples. No regime except a fully constitutional-democratic one (for which the Yugoslav masses are as well suited though somewhat less prepared than their Greek brothers) would satisfy them. How deeply communist affinities among the people—a communist monarchy is as yet not one of the feasible forms of government—have affected



the status of the monarchy, is not clear at this time. In June, 1944, Marshal Tito of the Yugoslav partisans and King Peter's newly appointed Prime Minister Ivan Subasich (a Croat) agreed that, in exchange for Tito's recognition of the royal government, an election or plebiscite would be held after the war to determine the fate of the monarchy. Partisans were admitted to the cabinet-in-exile. The situation is complicated by the age-old conflict between the Serbs and the Croats. It should be borne in mind that to the dissident and secessionist Croats and Slovenes the Karageorgevich dynasty symbolizes Serbian centralism—tantamount to oppression. The maintenance of a common monarchy might well constitute the most serious obstacle to the planned federalization of the Triune Kingdom. The Croats would hardly have confidence in the monarchy as the unifying bond of the federalistic compromise. That they are closer to the republican solution than the Serbs proper is evidenced by their unanimous rejection of the proposed Italian puppet kingship under Aimone, Duke of Aosta (as "Tonislav II"), a member of the house of Savoy. In November, 1944, it was learned that Marshal Tito, heading the partisans of the National Committee of Liberation, and Premier Subasich's government in London had agreed on the establishment of an all-party federal provisional government and the creation of a Regency Council of three members, each of them representing one of the three principal nationalities. The future structure of Yugoslavia is to be federal with equal rights of all component regional parts. Free elections of a constituent assembly are to follow at the proper time, and the idea of holding a plebiscite on the issue of monarchy versus republic seems to have been dropped. King Peter, after an ill advised attempt at frustrating the settlement by dismissing Subasich—obviously inspired by his uncle and colleague King George, had to yield. Not even the selection of the members of the Regency Council was left to his discretion.

Much will depend on the fate of monarchical restoration in the neighboring states. A uniform solution for all Balkan states is to be desired because the continued existence of mon-

archy in one country would encourage efforts at monarchical restoration in another turned republican, and the success of republicanism in the second country would inspire a republican movement in the first; and a Balkan confederation of countries adhering to different forms of government cannot be envisaged, the essence of federalization being homogeneity among the units. Were it composed of monarchies only, it would easily grow into an alliance of the rulers to hold down republicanism in their countries, a Holy Alliance in miniature though no less undesirable.

(d) RUMANIA. Here is the singular spectacle of a "legitimate" king, young Michael, succeeding to the throne in 1938 when his father Carol II abdicated in answer to the expression of a rare unanimity of feeling in the entire population—whereupon the exiled ruler became a pretender. The issue of the monarchical establishment, therefore, will largely turn on Carol's eventual restoration to the throne. The ex-King, an undesirable alien in practically all civilized countries and a most undesirable product of our civilization, has no claim to restoration as monarch nor to respect as individual. From February 27, 1938 (date of the "octroyed" constitution),<sup>15</sup> on, his regime was an inept imitation of King Alexander's royal dictatorship in Yugoslavia, touched up by the most unsavory inventions of the Nazis. There is hardly an illegality which he failed to commit, and his rule included ferocious anti-Semitic persecutions, wholesale assassination of political and personal enemies, unashamed looting of the country in the grandest of styles—all in the name of monarchy by the Grace of God, hated as much by the landless and exploited peasants as by the aristocratic clans and the bourgeoisie.

King Michael is credited with the elimination of the Antonescu dictatorship (August 26, 1944). Although this claim is somewhat better founded than the claim of the Italian king under similar circumstances, it was in reality a clique of dissatisfied generals under Constantin Sătescu which dislodged the rival group in the hope of better terms for themselves from the approaching Red army. Be that as it may, the King

restored (September 4) the previous constitution, vintage 1923, which his father had abolished in 1938, and became again the constitutional center of the formation of the rapidly succeeding cabinets. In the first Satanesco government of national concentration the Socialists and Communists outweighed the Farmers party (under the respectable leader Juliu Maniu), and the Liberals (under the old-style parliamentarian Bratianu); in the reorganization of the cabinet (November 4) these parties were dropped. The next cabinet of General Nicolai Radescu (December 16) lasted until March, 1945, when, after a brief interlude under Prince Barbu Stirbey, the Russians took a hand in the political game and "sponsored" Premier Peter Groza, whom the King duly appointed.

For the time being the monarchical issue is in suspense. At any rate, a communist monarchy is a novelty in the repertory of forms of government, and one which Marx, Engels, and Kautsky would have found difficult to reconcile with socialist orthodoxy. This is seemingly the interpretation of Stalin's cryptic statement, prior to the invasion of Rumanian territory, that the Soviets would not change the political and social structure of the country.

(e) BULGARIA. Such scanty information as can be gathered indicates that the fate of monarchy in Bulgaria has been sealed since her surrender to the Russians. The whereabouts of the infant King Simeon are unknown. Prince Cyril and other members of the Regency are reported to have been abducted to Russia and executed as war criminals. Seemingly the Soviets had little hesitation about coordinating the Bulgarians—a Slavic folk including a predominant farmer class that has long had strong Communist leanings—to their form of government and society. The dynasty is justly held responsible for dragging the people twice in a lifetime against their will under the German yoke. The Coburg dynasty, relatively new in Bulgaria,<sup>16</sup> was never popular although King Boris III was one of the shrewdest rulers of this age. The spectacle of Bulgaria, shaking off the monarchical regime with Soviet assistance, may have a profound effect on other Balkan states where the

Russian insistence on "friendly" governments weighs in the scales.

(f) ALBANIA. The question of "monarchy" in Albania will be treated cavalierly here, although King Zog, as brutal an autocrat as can be found anywhere in the Balkans, does not lend himself to such treatment. He may benefit by a general restoration wave in the Balkan area although, to judge from the reactions of the Albanian "free movements" in the United States, his return to power would be unwelcome to most of his "subjects." For the time being his request to return has been wisely denied by the Allied governments. That a genuine "choice" of the form of government by the Albanian people is possible, either through a national assembly (the meeting of such a group was reported) or through a plebiscite, may be doubted by even the most inveterate believer in carrying democracy into the wilderness. Political democracy is inoperable among uncivilized mountain tribes. To waste more paper on Albanian problems seems not justified.

#### (4) *Restoration in Heretofore Nonmonarchical Countries*

However, the area of potential monarchical restoration is wider. It should be remembered that until the end of the First World War<sup>17</sup> all European states were monarchical, except the Swiss and French republics. Nations usually scrap monarchy if it is identified with a lost war, which in our time a dynasty hardly can survive. May it not be that, after another lost war, popular disappointment will focus on monarchy for a change? Obviously there is no such thing as a congenitally monarchical people; even the French, with their glorious monarchical past, became in time convinced republicans and democrats.

Countries which may consider monarchical restoration are Spain, Austria, and Germany. Royalism in France<sup>18</sup> before the collapse of the Third Republic had been more active and more skillfully articulate through the Action Française under its brilliant leaders Maurras and Daudet than anywhere else in Europe. Moreover, it had penetrated into the nationalistic

leagues, and the pretender, the Count of Paris, played an important role behind the scenes. But De Gaullism is visibly unaffected by it, and monarchy can no longer be considered as a serious alternative to the republic.

(a) SPAIN. At the moment when these lines are written the Franco dictatorship in Spain, as ruthless against its enemies as its German counterpart, as ineffective for improving the lot of the common man as its Italian model, and probably more corrupt than either,<sup>19</sup> is in the throes of its gravest crisis. Franco, with the impending downfall of the Nazi regime, felt the ground shaking under his feet. This was brought about more by pressure of democratic world opinion than by the attacks of the divided Spanish republicans-in-exile. All objective observers agree that the Spanish masses, after centuries of exploitation by the Catholic Church and the ruling landowners, are profoundly democratic and, unrelenting as the Franco dictatorship itself, loathe its head, the Falange, and all they stand for. In a postwar world composed of democratic states, even a man of Franco's brazen resolution would feel uncomfortable, sitting permanently on the bayonets. The last relic of totalitarianism in Europe could not stand up against the Spanish people in a new civil war, without the arms and men from the dictators in Berlin and Rome. With British public opinion rising in indignation, Mr. Churchill's "kindly words" about Spanish fascism have become hollow. Unless all signs are wrong, the end of the Spanish nightmare is in sight. Franco himself, vainly trying to sell his regime to the world as an "organic" or "disciplined" democracy, was seeking *Anschluss* in the eleventh hour with the United Nations. But it is obvious that the church, the grandees, the landowners, the horde of pensioners, and perhaps the City of London and influential sections of the British Tories would rather see restoration of the Spanish Bourbons<sup>20</sup> than a constitutional republic, necessarily tending to the left. Different from the Nazi regime, the Falangist state is basically traditionalist, retrospective, reactionary, and had continued to be respectful to the monarchy.<sup>21</sup> That the Spanish people, remembering the dictatorship of

Primo de Rivera under Alfonso XIII, would be satisfied with anything less than a full-fledged republic, is unlikely. The republicans naturally deny the possibility of a monarchical restoration; but as a compromise solution between a radical republic and a rabid dictatorship it might have advantages, and it would have a chance if a restored Spanish republic should fail to consolidate itself. All that can be said now is that no monarchical movement in postwar Europe has a better chance of success than the one that seeks restoration of a Bourbon to the throne of Charles V and Philip II.

(b) AUSTRIA. Austria has a pretender in Otto von Habsburg, supported by active pressure groups in the disguise of "free movements." Austrian legitimism relies on a people at home violently recoiling from a Nazi infatuation, and—more important—on the oblique promise by the Moscow Declaration <sup>22</sup> of Austria's international independence, interpreted by many as the definite bar to *Anschluss*, by others as a solemn engagement to support permanently a country economically incapable of making its living, and therefore necessarily a recipient of international charity. How Austria reacts to the hopes of Habsburg legitimism can only be guessed, although it may well be that the pretender and his clique badly underestimate the people's political intelligence. The composition of the provisional government of Dr. Karl Renner, announced in April, 1945, in which the leading Communist, Ernst Fischer, holds the portfolio of public education, would hardly promote the monarchical cause.

(c) GERMANY. There is the much larger issue of monarchical restoration in Germany. Among the many blueprints of "what to do with Germany," mostly useless because of the unknown  $x$  in the international equation—namely, the mind and mood of the German people after the fall of the regime—the monarchical alternative merits at least serious consideration. It is true that German legitimism before 1933 was far from significant, and that the idea of monarchy was entertained only in the most abstract form, except in Bavaria. But scanty reports during the last stage of the Nazi regime indicated that among

people who have fallen from the frying pan of the unsuccessful Weimar democracy into the fire of Hitlerism with the loss of parts of their skin, monarchical tutelage may have taken on in retrospect the character of a safe refuge, for which more and more persons long with increasing intensity.

The reality of such speculations is beyond our grasp. The masses of the older bourgeoisie hardly have forgotten the Kaiser's un-Prussian desertion of the army in 1918, and the ignominious exit of all the vaunted dynasties. To the younger generation, to the totalitarian-indoctrinated youth as well as the laboring classes of all persuasions, the resurrection of an institution over which the Nazi regime has untiringly poured ridicule and contempt, and whose feeble efforts of regroupment were ruthlessly stamped out, cannot possibly mean much. But the German army might consider monarchical restoration as an insurance against loss of its privileges, and big business might be influenced by the feeling that it could stave off collectivization better under a conservative monarchy than under a radical republic either dominated by, or in affinity with, Russia. There is more than a grain of salt in the contention that the Germans are authority-minded. Monarchy might satisfy their desire to be led as well as their craving for glamour and class distinctions. And there is, in general, no limit to the quirks of a German mind warped by misery, defeat, and despair.

The problem is all the more incalculable against the background of the potential centrifugal dynamism inside defeated Germany. If Germany should be dismembered, either by outside insistence or by spontaneous internal explosion, it is not beyond the possible that the fragments, or some of them, would seek individual salvation in a return to their traditional monarchical allegiance. In case Germany is broken up, or breaks up, into its historical units or into parts more corresponding to economic rationality, it is almost certain that the monarchical solution will be seriously considered. Will the world be treated to the spectacle of a horde of rival dynasties so eloquently ridiculed by Heine? Cynics might say that a Germany

dismembered and disunited by divergent forms of government, preoccupied in gluing together the pieces of shattered national unity, would have no time to become an international threat and mischief. But the experiment could backfire, and no person with historical sense would advocate such an apprentice sorcerer's adventure.

(d) **BAVARIA.** More definite is the issue of monarchical restoration at least in Bavaria, where legitimism was stronger than in any other part of the Reich.<sup>23</sup> The dynasty of the Wittelsbachs, having ruled in Bavaria for more than nine hundred years without interruption, remained popular after the establishment of the republic in 1918. Its members continued to live in Bavaria and played an important role socially. The leading Catholic People's party was monarchical in sentiment though not actively so in program. Crown Prince Rupprecht had the reputation of being a liberal. On the eve of the Nazi conquest the restoration of the monarchy was made an object of belated and futile negotiations: the plan found the support of the Socialists.<sup>24</sup> In Bavaria monarchical sentiment is enhanced by the violent anti-Prussianism of the people, which did not subside under the brown veneer of Nazism, in spite of the favors Hitler heaped on his beloved Bavarian people and on Munich, "the Capital of the Movement." The Bavarians, with their Celtic emotional streak, were the first to yield to, and the first to fall from, Hitler. But even in Bavaria monarchical restoration would raise serious questions of unity, because the Protestant Franconians were ardent Nazis throughout and probably would not follow the monarchical lead of southern Bavaria. But if the thesis of this book is followed by the United Nations—of which there is little prospect—the problem of monarchy in Germany is wholly academic, because the German people should not be permitted to have any government of their own for a long time to come.



## CHAPTER II

### *Typological Analysis of Monarchy As Form of Government*

To provide an answer to the only questions relevant here—namely, whether under the division of governments into autocracies and political democracies monarchy is a “permissible” form—the reader is invited to join in an excursion into seemingly distant fields of constitutional history. If some monarchists wish to participate it will do no harm, because an analysis of the types of monarchical establishment, and of the variants within the types, may help to clear away the fog surrounding the issue. “Monarchy” and “republic” are merely nominalistic frames of reference for substantially very different things. As a “form of government” neither is “good” or “bad”; the term as such is wholly neutral. Under either form the value judgment depends on where political power is located, on how it is exercised to form the will of the state. “Monarchy,” like “political democracy,” is a generic term, but one of singular elusiveness. Being much older than democracy, monarchy has a functional core so surrounded by emotional and irrational inferences derived from its mythical origin and the veneration paid to it through the ages that it is difficult of penetration. Intrinsically less accessible to rationalization—the convinced monarchists even pretend that rationalizing the institution would destroy its value—the monarchical establishment dwells in a rarefied vagueness and indefiniteness which continues to impede a precise delineation of form and

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See pp. 445-450 for footnotes to this chapter.

substance, of mere attribution and actual exercise of the functions of political power.

#### HISTORICAL TYPES OF MONARCHY <sup>1</sup>

A glance at the past reveals that, typologically, hereditary monarchy must be distinguished from elective monarchy: under the first, one ruler follows another in automatic succession in a definite dynasty; under the second, after the demise of a ruler, his successor is determined by certain elective procedures. The second pattern obviously would not fit into our time even if it had worked better in the past, under the Holy Roman Empire of the Germanic Nation or in Poland. Modern monarchists are legitimists, devoted to a specific dynasty which, traditionally and excluding competitive challenges, claims the hereditary right to the crown. A ruler elected either by the people or by an electoral college would be nothing but a democratically or aristocratically elected state president, lacking whatever prestige the tradition of a hereditary monarch may have, and gaining none by election. The Germans could not create a genuine monarchical legitimacy by assigning the selection of the future Emperor to the former ruling houses. Nor would a democratic Kaiser be more than a play on words. Hereditary legitimacy, therefore, is the only positive legitimization of monarchy.

From the functional viewpoint, monarchy in its historical evolution is absolute, or constitutional, or parliamentary.

Even the most ardent defender of the monarchical principle would hesitate to recommend the revival in our time of absolute monarchy, under which the ruler of divine right, as *princeps legibus solutus*, would be beyond constitutional limitations, acting as the custodian of his subjects and responsible for his power to God and history alone. The world has had its fill of pseudodemocratic and charismatic absolutism and would hardly find it more palatable if attached to a dynasty. The last specimen was liquidated by a Bolshevik firing squad on July 16, 1918, in Siberian Sverdlovsk (then Ekaterinburg). Likewise ruled out is its mitigated application, the feudal or

patrimonial monarchy. Implying an economic system of nominal ownership of the land by the crown as much as a state of mind, based on mutual loyalty and protection between prince and subjects, it cannot be reconstructed.

#### THE NATIONALIZATION OF THE CROWN

One of the lasting achievements of the Great Rebellion in England, and of the French Revolution, is the transformation of the ruler from master of his people to an organ of the state. The revolutions "nationalized" the king. Constitutional history since 1789 may be condensed in the statement that political power of the monarch either became subordinated to the will of the people, or was altogether eliminated from its formation. Sovereignty in its absoluteness was transferred from the monarch to the people. The fruitful idea of the separation of powers, intended to limit the arbitrary powers of any government though primarily of the prince, confined the ruler to the functions of executive, even though at first he shared the legislative powers with the representatives of the people; the latter, in turn, were subjected to relentless democratization which, eliminating feudal residues, ultimately converted them into a genuinely democratic parliament. The crown had lost the game when, in 1789, the French Constituent Assembly claimed for itself the *pouvoir constituant*, the supreme power to determine the form of government. Subsequently efforts to square the circle by reconciling the monarchical principle with the sovereignty of the people were bound to be futile because logically there cannot be, within one and the same state, two original sources of political power. Monarchy received cold comfort from the assumption that "the king can do no wrong." Ministerial responsibility, universal suffrage—slowly reached—control of the exercise of political power through political parties were the technical devices for the final victory of democratic dynamism over the monarchical establishment. The historical retrogression of monarchical power under the pressure of democratic institutionalization was neither synchronized in the different countries nor accomplished without tem-

porary setbacks. But the July Revolution of 1830 in France and the Belgian Charte of 1831 finally established in the Western world parliamentary ascendancy over the ruler. His legitimacy was no longer by divine and hereditary right, but by the Grace of the People. It became embodied in the contractual form of a constitution which strictly limited the royal prerogative. Monarchy thereafter was "constitutional" because it was limited. A generation later—all political innovations require time for becoming integrated—what authority the crown retained had shrunk into dignity, and the political power it still had was based not on function or office but on the personality of the monarch.

#### CONSTITUTIONAL MONARCHY

Monarchy after this war can be, and will be, only "constitutional" or limited monarchy. This is the admitted aim of the monarchist groups. But the discussion is obfuscated by the lack of knowledge among them and among the general public on what the pattern of constitutional monarchy really means. Frequently it is asserted that restored monarchy should be "as in Britain or in the Scandinavian countries." But the concept of constitutional monarchy is intrinsically equivocal. It covers at least two widely diverging patterns: the constitutional monarchy of the Central European or, more precisely, German application, on the one hand; and the parliamentary monarchy of the Western variety, on the other. Even within the latter category there exist basic structural differences which make the British monarchy widely different from its Belgian or Swedish counterpart.

#### CONSTITUTIONAL MONARCHY OF THE CENTRAL EUROPEAN TYPE

The essence of the Central European version of constitutional monarchy is commonly expressed by the sententious slogan, *Le roi règne et il gouverne* (The king possesses legally, and exercises actually, political power). The historical type is derived from indigenous enlightened absolutism and owes much less to Western models than the insistent references of

German doctrinaire liberalism suggest. Dissimilar from the dualist concept of the feudal monarchy, under which the representative bodies (estates, *Stände*) were legally recognized interest or pressure groups without formal integration into the state, the Central European constitutional monarchy has two organs: the monarch and the parliament. As a rule the legislative functions are exercised by the monarch and the parliament in conjunction; administration and military command belong to the crown alone, perhaps with some control by the parliament, particularly through the budget; adjudication is in the hands of courts which though appointed by the crown are independent, subject to the law alone, and administering justice only formally in the name of the king. But the dualism between the two mutually exclusive ideologies—the monarchical principle, and the sovereignty of the people—is not solved. The essential fact inherent in this artificial equilibrium is that restrictions on the exercise of political power by the monarch exist only in so far as they are explicitly contained in the constitution—practically a contract between ruler and parliament even where the charter was granted or imposed (“octroyed”) by the ruler. In case of silence of the constitution and particularly in case of deadlocks, the presumption of political power is in favor of the crown. The power of the king over the government and the parliament is still very real. Ministerial responsibility and the requirement of countersignature of the ministers for all acts of the crown are nominal brakes only because the ministers are appointed and dismissed by the king and are not dependent on the confidence of the parliament. Obviously the system is only a fair-weather craft. In case of conflict with the parliamentary parties the crown prevails. At best the system is of value as an expedient for the transition from absolute and feudal to parliamentary monarchy. But it should be emphasized that intrinsically and pragmatically it is authoritarian government and nothing else. This situation must be faced squarely.<sup>2</sup> During the last decades we have learned too much about the character of authoritarian government to misjudge the situation. The essential feature of authoritarian monarchy is that the people

through their elected representatives do not control the exercise of political power by the king even if they are expected to give it their support. The authoritarian character of the regime was mitigated in practice by the scrupulous observance by the government of the rule of law in its relations with the citizens, granting them impartial internal administration under an efficient and integrated bureaucracy beyond the suspicion of corruption. True, the tangible benefits of a well oiled administrative machinery compensated the common man to a considerable degree for exclusion from any part in forming the political will of the state. The rule of law is wholly compatible with authoritarian government. Constitutional monarchy under this arrangement is no less authoritarian because of the clever fiction that supremacy does not rest either with the crown or with the parliament but is vested in the abstract constitution stipulating their correlation. This apparent reconciliation of the dualism between popular sovereignty and royal prerogative could not conceal the irrefutable fact that the ruler was politically stronger than the parliament. His prerogative as holder of the supreme power (*Träger der Staatsgewalt*), supported by the legal theory of the time, was impervious to democratic concepts. This was the pattern of constitutional monarchy which was evolved in Prussia and transferred to the German Imperial Constitution of 1871. Illustrating where political power was ultimately located, the famous "constitutional conflict" of 1862–1866 between the Prussian crown, guided by Bismarck, and the Prussian Diet was the most tragic single incident in the evolution of German liberalism and constitutionalism and was one of the most conspicuous causes of two world wars.<sup>8</sup> Under authoritarian monarchy the government (ministers and cabinet) are appointed and dismissed at the discretion of the crown, regardless of the parliament. This practice was continued in the German Empire after 1871. The Kaiser appointed at will the Reich Chancellor and his collaborators, who used devices of skill, diplomacy and maneuvering if they wished to get along with the Reichstag; but the parliament could not enforce their resignation except sometimes by indirection. Only when the

First World War was lost, what was called the "parliamentarization of the Reich government" took place through a belated amendment of the constitution making the cabinet dependent on the confidence of the Reichstag.<sup>4</sup> It was on this hidden reef of the dormant prerogative of the head of the state—to be revived in case of a deadlock between the Reich government and the president, on the one hand, and the parliamentary parties, on the other—that the Weimar republic ultimately foundered. It simply relapsed into the authoritarian tradition of "presidential" cabinets, which existed by the prerogative of the Reich president without requiring the support of the parliamentary majority. The abuse of presidential powers became the entering wedge for "constitutional" dictatorship and Hitler's despotism.<sup>5</sup>

Without exception, the Balkan monarchies were constructed on the German and not on the Western European pattern of "constitutionalism"—even the liberal-democratic constitution of the Triune Kingdom of the Serbs, Croats, and Slovenes of June 15/28, 1921. The concept of monarchy was that the king legally possesses as well as actually exercises political power. It is this version of authoritarian "constitutional" monarchy which one by one overpowered the Balkan states in the period between the two world wars. The first break of constitutional legality came with the *coup d'état* of January 5, 1929, by King Alexander of the Triune Kingdom of the Serbs, Croats, and Slovenes, who, after two years of unashamed royal autocracy, resorted to the camouflage of a new constitution (September 3, 1931). Its pungent legitimist flavor revealed all the trimmings of the Central European version of authoritarian monarchy.

The other Balkan monarchies did not miss the autocratic cue. King Boris III of Bulgaria permitted a military revolution<sup>6</sup> (May 19, 1934), which dissolved all political parties, and he ruled the country by royal decree, without altogether suspending the constitution of April 16/28, 1879. The authoritarian regime, against the will of the muzzled people, lined Bulgaria up with the Axis and against Russia. The recipe was promptly followed by King George II of Greece, who, in

August, 1936, suspended the constitution of 1911, in itself merely a replica of German constitutionalism, and identified himself with the dictatorship of Metaxas. Finally Rumania's King Carol, dissatisfied with his powers as monarch under the liberal constitution of March 29, 1923, toed the line and turned to royal dictatorship in the constitution of February 27, 1938. This disingenuous document, while nominally preserving the character of the constitutional monarchy, concentrated the political power in the hands of an autocrat as irresponsible as he was irrepressible. Dictatorship is no less obnoxious for being by an anointed ruler. In all these cases the germ out of which autocracy blossomed into life, was the dormant royal prerogative which permitted the perversion of authoritarian into dictatorial monarchy. Royal autocracy was grafted onto the authoritarian premises of constitutional monarchy. This *mene tekel* should not be ignored when, after this war, return to the "traditional" monarchical form of government is advanced in some countries as a panacea for the ills of democracy and dictatorship alike.

Constitutional monarchy, therefore, in which the royal prerogative is not strictly and precisely circumscribed and rigidly curbed, is an authoritarian and, therefore, a nonpermissible form of government.

#### PARLIAMENTARY MONARCHY

The pattern of the parliamentary monarchy was developed first in England; even there it waited for its full sweep until the Great Reform of 1832.<sup>7</sup> In France the legitimist interlude of authoritarian monarchy under the Constitutional Charter of 1814 came to an end in the July Revolution of 1830. The Belgian Charte of February 7, 1831, deliberately introduced the British pattern of parliamentary monarchy on the continent by declaring that all powers emanated from the people (Article 25), and that they were to be exercised in conformity with the constitution. It is the venerable ancestor of modern democratic constitutionalism, and perhaps the most influential constitution ever devised.



The famous slogan for the new pattern of parliamentary monarchy is, *Le roi règne, mais il ne gouverne pas*, which implies that nominally the king is still the source of political power, but he is excluded from its exercise. Under this system, monarchical in form but no longer in substance, the crown does not participate in the formation of the will of the state, even by delegation or in conjunction with other organs. Reconciliation between the monarchical principle and the sovereignty of the people is achieved by the ruler's factual elimination from the political decisions. The assumption that all powers emanate from the people is the reality which implies that the plenitude of political power is in the hands of the parliament or the people; the presumption, in case of doubt, operates against the royal prerogative. Legislation is conducted by the parliament alone, the king's assent being a mere formality—he does not even have a suspensive veto. The government is conducted by the cabinet which is dependent on the confidence of the political parties which compose the majority of the parliament. In order to make parliamentary control over the government fully effective, the ministers as a rule must be members of the parliament. The monarch is bound to accept the political decisions of the cabinet. The ministers are not his free choice even though under the continental multiple party system his selective discretion is not altogether extinct. All acts of the king are countersigned by the ministers. Ministerial responsibility means accountability to the parliament and no longer to the crown. Political power has shifted from the monarch to the cabinet and—where the latter is subject to dissolution, as it is in all parliamentary monarchies—to the electorate. What is left of the royal prerogative is purely ceremonial, symbolic, even though the monarch is considered as the nominal head of the administration and, on the continent, the commander-in-chief of the armed forces. This form of government, by responding to the will of the people and subjecting the crown to the political guidance and tutelage of the cabinet (in itself under control of the parliament and people respectively) is fully consonant with political democracy. It is a permissible form of government.

BRITISH AND CONTINENTAL PARLIAMENTARY MONARCHY  
DISTINGUISHED

Even the pattern of parliamentary monarchy is not a uniform or rigid one. In the course of the last century the monarchical regime in Western and Northern Europe became markedly different from its British model.

*(a) The British Monarchy*

Monarchists of today when pressed to be specific as to the kind of monarchical establishment they wish to see in their country, usually counter with "One like that in England." True, the British monarchy has the best world "press," perhaps deservedly.<sup>8</sup> But those who wish to imitate the British model ignore the fact that British monarchy, like British parliamentarism, is a nontransferable commodity, and that the present harmonious integration of the crown into the democratic dynamism of the political parties is the fortunate and unique result of a number of circumstances elsewhere not reproducible. It is less the allegiance to a specific hereditary dynasty which intrenched the monarchical establishment in the minds of the people—Britain has had more ruling houses than any other nation in which monarchy has enjoyed an uninterrupted existence.<sup>9</sup> Among the rulers were fools and mediocrities, but fortunately no outstanding political genius. Beginning with Queen Victoria, none of the rulers has made himself conspicuous, either positively or negatively, so that the personalities could become absorbed by the institution. Moreover, at an early date the British gentry domesticated royal lust for power by chopping off the head of a king who, far from being the worst they had had, misread the signs of the time and misconstrued the temper of the new middle class. This precedent could not fail to influence the succeeding rulers. Twice in the relatively recent past the British forcibly ejected an obnoxious king. For a nation with less historical sense the case of James II may be ancient history; but not only its legal phraseology helped when Edward VIII met with a similar fate. How much the change

of dynasty from the house of Stuart to the house of Hanover (1714) weakened the position of the monarchy through the emergence of cabinet government and the prime minister is common knowledge. Moreover, the rare mixture of ceremonial tradition and realistic common sense which spread from the British ruling classes to the people, induced them to respect the office of king without unduly exalting the incumbent, provided he kept within the limits of his office. The striking success of an almost unbroken chain of reasonable rulers from Queen Victoria, who through her long tenure acquired more independence than the office as such afforded her, to George VI may be regarded as accidental or providential, according to the rational or romantic temper of the observer. But it testifies as much to the intrinsic value of monarchy as an institution as to the adaptability of the persons serving it. Had the rulers possessed more powers, the record probably would have been far less satisfactory. Kingship in England exists through its limitations, not through its potentialities. But it is the latter and not the former which make monarchy attractive to the monarchists elsewhere. Edward VIII's enforced removal was accomplished without a lasting impairment of the institution. The facts are only partially known; but in retrospect it is easy to realize what an encumbrance a self-willed ruler would have become in the subsequent life-and-death struggle of the British nation. Such irrational factors make the British monarchy a singular if not a unique phenomenon which is inaccessible to either imitation or transplantation.

Actually the powers of the British crown are much less than the purely legal approach to the institution would indicate, and considerably greater than they appear to be from the commonplace and inaccurate description of the monarch as a "figure-head." What Dicey wrote in 1885 holds true today: "The oddity of the thing is that to most Englishmen the extent of the authority actually exercised by the Crown . . . is a matter of conjecture."<sup>10</sup> The basic difficulty for other nations desiring to follow the British "ideal pattern" of monarchy is precisely its imponderable and intangible nature. The royal power or pre-

rogative is partly overformulated, partly not formulated at all. Any nation undertaking to introduce the British system would be at a loss to define what precisely constitute the prestige and the powers of the British crown. Bagehot's famous three rights<sup>11</sup>—the right to be consulted, the right to encourage, the right to warn—are no longer true in the literal sense as they were at the height of British constitutionalism in the mid-Victorian period. Today the right to be consulted is reduced to the right to be informed or to ask for explanations, which is considerably less. Nor is Bagehot's *bon mot* any longer correct:<sup>12</sup> "Royalty is a government in which the attention of the nation is concentrated on a person doing interesting actions. A Republic is a government in which that attention is divided between many, who are all doing uninteresting actions." By no stretch of imagination is it true that a nation can be more interested in the utterly dull routine of a British king than in the actions of an American president. The degree of self-effacement which constitutes the official qualification for the successful British ruler is more than could humanly be expected from a pretender returning to the throne eager to do deeds, and not to do deeds by not doing them.

The only visibly important function performed by the British king today is to appoint the prime minister; and, more often than not, even this function is merely automatic, because the leader of the party victorious at the polls has the first and unalterable claim to the office.<sup>13</sup> The king may exercise his discretion only if the Conservatives are the majority party but have no recognized leader, or if no party has a majority. It is exactly on this function of the crown within the parliamentary dynamics that monarchists base their argument for restoration, because no continental country had, and probably none will have, a clear-cut two-party system. The king, it is contended, would be "above the parties" and thus would select the government personnel in the interest of the country as a whole. Again this is a misunderstanding of the British model. The British crown is not above but under the parties, and the outgoing prime minister usually recommends his own successor.<sup>14</sup> But it

is unquestionable that, had the competition of the three parties continued, it would have ultimately enhanced the powers of the crown.<sup>15</sup> Thus, the British system if transplanted to the political environment of the multiple party system on the continent, would lose its identity and approximate the continental type of parliamentary monarchy.

All the other functions of the British monarchy are merely formal, undertaken by the king on the advice or the instructions of his responsible ministers. His presence in the Privy Council is meaningless since no discussion takes place. From cabinet meetings he is excluded, although the minutes are accessible to him. A monarch, by virtue of a long tenure of office—longevity of monarchs had the additional advantage of making the heir apparent more mature—and industry and tolerable intelligence, can be, in W. I. Jennings's words, "extremely valuable." Would any of the ambitious pretenders be satisfied with filling a position whose main prerequisite is self-restraint to the point of self-effacement?

There is, of course, the emotional and symbolic aspect of British monarchy, or what Bagehot calls the "dignified" functions. It serves as the focus and concentration of a sound patriotism which, remote from continental Byzantinism, honors the office of king in the person of the incumbent. It may remain undecided here whether such noble sentiments can be centered on a continental monarch after the magic circle of the hereditary character of the institution has been broken by dethronement and exile. But that a solid mythology, serving identical emotional purposes, may well grow out of republican abstractions is evidenced by the devotion of the French people to the abstract principles of 1789, and of the American people to its constitution. If, however, symbolization of national values is confused with the glamour of the monarchical establishment (the British covered up, very wisely, the adverse effect of the ejection of Edward VIII by the medieval splendor of the coronation of his successor), it may be remembered that the masses, for whose edification royal splendor is unfolded, are moviegoers. No expensive state ceremony can equal the Hollywood

glamour of the fabulous Orient in Technicolor. Kings after this war not only will be poor but will have to be very careful not to be too glamorous, lest the uncomfortable republicans clamor about waste of public funds.

Whatever twist one may give to the positive aspects of British royalty, a spread of the system to the continent in the wake of political reconstruction would presuppose not only a moral endowment in the pretenders equal to that of the British model, but the existence of a political milieu similar to that of Britain; and it is unlikely that any continental country will answer the description.

(b) *The Western Parliamentary Monarchy*

On the other hand, under the pattern of parliamentary constitutional monarchy that prevails in the six Western and Northern monarchies—the Netherlands, Belgium, and Luxemburg, Sweden, Norway, and Denmark—the ruler's share in actual political power is considerably greater than in Britain. Though constitutionally more precisely defined than under the unwritten British constitution, the royal prerogative has retained much of the contour of kingship as it existed under the constitutional monarchy of the nineteenth century.<sup>16</sup> In terms of actual powers the crown occupies the middle ground between the British absorption of the royal person by the institution, and the Central European dominance of the royal person over the institution. As in Britain, the political structure of the state is completely democratic, governed by the accepted rules of the parliamentary system. Political decisions are taken exclusively by the government (prime minister and cabinet) who invariably are members of the parliamentary majority or of a coalition of the parliamentary parties. The electorate at regular or, in case of dissolution, irregular intervals determines the composition of the lower house and, through it, of the government. None the less, within this familiar dynamism of genuine democracy the king is not excluded altogether, as he is in Britain, from active participation in the formation of the will of the state. He must not only be informed; he must

be consulted and, particularly in foreign politics, may even give cautious leads—always acting through, and covered by, ministerial responsibility. This results partly from the personalities of the monarchs; but it is also due to a greater traditional acceptance of the royal prerogative, within the limits of the constitution, as a real influence if not power. Five of the six rulers by the good fortune of a very long tenure of office, have been able to accumulate a political experience hardly equaled in their countries.<sup>17</sup> The sixth in this group is King Leopold III of Belgium, who succeeded his father in 1934 and, thus, at the outbreak of the war against his country, had been in office six years.

The powers assigned to the crown in the different constitutions cannot be discussed here in detail. The text of a constitution, read without allowance for the much more important constitutional practice of limiting the monarch's formal powers, may convey the impression that the state is focused on the monarch, because the rules of the parliamentary system, difficult to set forth in legal terms, are implied and not articulated in the constitution itself.<sup>18</sup> However, a king who loyally conforms to the verdict of the people as reflected in the strength of the parliamentary parties has necessarily a good deal of discretion under a multiple party system which does not permit the automatic assignment of the government to a specific majority group. This is particularly true of Holland, where the unfortunate fragmentation of the electoral will has never prevented the forming of workable coalitions. In Belgium the more or less stable configuration of the Catholic, Liberal, and Socialist parties offered no specific problems; and in both Sweden and Denmark recently the Socialist party had an undisputed majority. The supreme command of the armed forces, an attribute of the crown, is completely subordinated to parliamentary control except in Belgium, where the king, himself feeling as a soldier, took more responsibility under the prerogative than another monarch in this group would have dared or cared to do. However, perhaps the greatest actual (today, largely extraconstitutional) power lies in the monarch's influence in foreign politics,

justified when based on long experience and familiarity with international affairs. Here the solidarity existing among the ruling families, once a liability of the peoples, may have become an asset of the states.

However, King Leopold, an activist personality who may have felt the conflict of the generation to which he belongs, decidedly overstepped the limits of his office in October, 1936, when he announced, without previously consulting his cabinet or Foreign Minister Spaak,<sup>19</sup> Belgium's withdrawal from her commitments to the Western powers, including the Locarno obligations. This arbitrary and dangerous action may have been within the royal prerogative, but it was a calamitous error which contributed much to Belgium's later military isolation and defeat. No British king would have dared to confront his official advisers with such an act. (Was it pure coincidence that, immediately thereafter, the British cabinet decided to rid the country of Edward VIII, who belonged to the same activist generation?) Nor did the Belgian king prove his intelligence by his inaction toward the rising Rexist movement. No interpretation of the royal duty of political neutrality should have prevented him from reproving its Nazi-inspired tactics and program.

If to the qualities of experience and reticence of modern rulers are added their impressive popularity, the traditional loyalty of the people to the person of the monarch rather than to the dynasty, the simplicity of life preferred by them, and their capacity as social leaders, the considerable strength of monarchy in Western and Northern Europe becomes understandable. It seems fully to live up to the function of the *pouvoir neutre* as Benjamin Constant conceived it. By no means above the parties, but scrupulously below them, monarchy conforms to the democratic spirit of profoundly democratic nations, a useful institution which none of the nations endowed with it would seem to be willing to exchange for a republican regime. Monarchy in these six countries is coming out of the crucible of the war stronger, with convincing proof of its usefulness as an institution of political stability and continuity.

If, under proper constitutional precautions, restoration



would or could be patterned on the model of the Western parliamentary monarchy, no objections from the viewpoint of democratic legitimacy could be raised. This type of monarchical establishment conforms to the requisites of political democracy, and hence is a permissible form of government.

#### CONCLUSIONS ON THE PERMISSIBILITY OF MONARCHY AS A FORM OF GOVERNMENT

The preceding discussion leads to the following conclusions: The advocates of restoration in countries where monarchy did not exist prior to Hitler, or where its reestablishment is challenged by the people, should disclose their intentions and declare which pattern of monarchy they intend to restore to the throne. A people that is to come under monarchy is entitled to know in unequivocal terms what kind of monarchy. Without such specification its "choice" between republic and monarchy, by plebiscite or otherwise, is made in ignorance or, even worse, from deliberate deception. If monarchy is proposed as an eligible form of government, it should be accurately defined in advance: whether absolute monarchy (royal dictatorship, which evidently no free nation would choose) or constitutional monarchy—and, within the latter category, whether the king is, or is not, to be rigidly subjected to parliamentary or popular control. Of the three variations covered by constitutional monarchy that of the Central European type is nonpermissible because it is essentially authoritarian. The British form and the Western European parliamentary monarchy are permissible because they are suited to, and compatible with, political democracy.

## CHAPTER III

### *Justification of Monarchy*

At this point a question long postponed must be asked and answered: On what grounds can restoration of monarchy be justified? We are not at all interested in the psychology of the pretenders themselves: obviously they believe, or assert belief, in the hereditary right and the historical mission of the dynasty they wish to continue; personal ambitions and desires likewise come into play. Nor do the motivations of their retinues matter; these people expect personal benefits and enrichment from a successful restoration. But the question, How can monarchy be justified in our time? is pertinent because monarchy cannot be the genuine "choice" of a people unless the monarchical establishment is made so palatable to the masses that they will vote for it.

Monarchy may be justified either on irrational and emotional, or on rational and utilitarian grounds. There is a good deal of overlapping between the two groups of arguments. Monarchy is so much a function of the imagination and a result of the historical subconscious that it is difficult to draw a sharp line between what is imponderable and what is expedient. Rational motivations frequently acquire an emotional appeal, while transcendental grounds accepted over a long period may take on the disguise of the utilitarian. Consequently the distinction is serviceable only if its relativity is taken into account.

#### IRRATIONAL JUSTIFICATIONS

Transcendental, mystical, magical, ritualistic, theological, religious, and other irrational conceptions of monarchy explain

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See pp. 450-453 for footnotes to this chapter.

its unchallenged acceptance in the past by the mass of the people; but in our age of science and technology they have lost their hold upon the common man, child of a disenchanted world. Monarchy no longer has the religious content which, under the mutual insurance pact between crown and papacy, church and state, once instilled devotion to the ruler together with veneration of the divine origin of his office. The claim of a monarch that, ordained by God, he rules by divine right would leave utterly cold persons in a materialistic world who at most are religious in a formal way, who on the average are indifferent to, and at worst are contemptuous of, spiritual values. The clause "by the grace of God" in the title of all rulers rings hollow in the ears of most people who are sophisticated enough to know that a man who, after living in Cairo, London, Massachusetts, or Mexico, has lately returned to the throne not by divine providence but by negotiation with partisans and opponents, by plebiscite and majority, by political maneuvers and economic manipulations lacking the odor of sanctity. Kings are no longer installed by God; they are made, accepted, and permitted to function by the people.

Equally obsolete to the point of absurdity is that patrimonial or paternalistic argument which asserts that the ruler is the "father" of his people. De Bonald, the literary propagator of the slogan "One God, One Father, One King" (the idea of which was ancient), did not dream that a century later an Austrian doctor who was anything but a monarchist would discover the Œdipus complex which, applied to political history, would permit interpretation of revolutions against the monarchical order as the natural reactions of the collective subconscious. Long before Freud another revolutionary, Rousseau, sufficiently ridiculed the assumption of "King Adam" and "Emperor Noah." But the "father" argument has persisted in monarchical theory. Says Treitschke: "That a single man stands visibly at the head whose word is decisive, impresses the common man. To him the word of the father of the country has a deep meaning."<sup>1</sup> It may well be that the ethical values of the family, which some authoritarian and dictatorial regimes of

Catholic mentality such as Pétain-France and Franco-Spain so strongly advertised, will likewise find their place after the war in democratic environments. But monarchy can draw little benefit therefrom. True, legendary kings in the past and long-lived monarchs of recent times have had the filial affection of their people. But presidents of republics, such as "Papa" Fallières or "Papa" Doumergue, have lent themselves no less to popularity. Nor is it likely that many persons in their senses would consider a youthful pretender as a possible candidate for the position of "father" of his country, to whom his people might turn in misery and distress. This side of monarchical mythology is exploded beyond repair.

#### JUSTIFICATION THROUGH LEGITIMACY

A more serious, and the most common, argument adduced for restoration is that the dynasty which claims title to the throne has a legal right to rule over the nation, or, in Treitschke's words, that it is "an inscrutable dispensation of Providence that just this dynasty rose above all others of the country."<sup>2</sup> Monarchical power, it is contended, is not delegated but is based on the original right to rule. Monarchy derives its rights from history which singled out certain families to rule. Monarchy has the advantage over republican government that it is based on an unshakable tradition through which a ruling family has become identified with the state and its interests. Usually the argument is adorned by references to the great kings of the past and their great deeds for state and people, the legendary memory of imposing rulers which even republics cherish as ingredients of their national patrimony.

The historic persuasiveness of this justification of monarchy cannot be denied. Ferrero has proved that monarchical legitimacy is one of the two basic justifications of any political rule, the other being popular legitimacy.<sup>3</sup> Acceptance of monarchical legitimacy is tantamount to popular consent; where government is based on the free consent of the people, neither government nor people has to fear the other, and the regime is stable. The argument may regain its potency after the war, in

whole or in part, if a skillfully conducted propaganda can evoke in the masses nostalgic recollections of the not-so-distant golden age when neither the horror of dictatorship nor the chaos of democracy had yet descended on the peoples who were blessed with peace and prosperity under their legitimate rulers.

But there are two requisites for an effective legitimacy: it must be predicated on the firm integration of the dynasty, and it must be uninterrupted in its exercise. Integration may be achieved even by a relatively new dynasty, as evidenced by the house of Bernadotte in Sweden (since 1810) and the house of Coburg in Belgium (since 1831). But against the contention that a certain dynasty has an indestructible tradition and an inherent right to rule it should be remembered that not one of the older dynasties survives as a ruling house. In Spain and in France the Bourbons were forced to retire from the throne; in Austria-Hungary the Habsburgs; in Prussia the Hohenzollerns; in Bavaria the Wittelsbachs; in Saxony the Wettins; in Hanover the Guelphs. Long established are only the house of Holstein-Sonderburg-Glücksburg in Denmark and the house of Orange-Nassau in Holland. ✓ If legitimacy is conceived as the traditionally accepted right to rule, these are practically the only legitimate dynasties in Europe. Even the house of Savoy has an ancient title only to Piedmont: it acquired title over the remainder of Italy in the unification—in many instances by plebiscites, and thus only by democratic legitimacy. ✓ In many cases the rulers were foreigners and not even indigenous families of established prominence. Moreover, generally the royal rule was created not by the people themselves even when national assemblies were set in motion, but through diplomatic pressure of the powers. On closer analysis the argument of legitimacy becomes rather shabby. How could a rational choice be invoked, after the war, for the return or restoration of dynasties so superficially rooted in the nations, with so small a claim of merit and affinity to the people? Only an age for which the monarchical establishment was the normal and natural form of government could take legitimacy for granted. Will the age of the common man be equally lenient and forbearing?

## RESTORATION OF THE DYNASTY AFTER A REPUBLICAN REGIME

Such congenital shortcomings may be overlooked or tolerated in some countries where the monarchs are in exile and legal continuity was not broken. But the case is different when it comes to restoration in countries formerly republican and democratic. It happens that the legitimacy of the expelled dynasties, of ancient origin and claiming veneration since time immemorial, had been interrupted by abdication or dethronement, enforced by their peoples, by flight, exile, physical alienation from their country. This may not be the fault of the present pretenders, but none the less it is a fact. Germany, Austria, France, Spain were able to live without the dynasties as outright republics, and Hungary, nominally a monarchy, was factually an oligarchy or squireocracy. Whatever magical appeal legitimacy of title and inherent right may have for persons who are accessible to such values, the spell was broken by the subsequent republican regime. An interregnum is a gap between two monarchical regimes,<sup>5</sup> even though the period was filled with a republican order. Continuity in royal power, uninterrupted exercise of the ruler's functions, is an indispensable requisite of legitimacy. Once the chain has been broken, a disenchanted people will no longer accept the claim to legitimacy without challenge; and to be so accepted is precisely its essence: once the actuality of political power has disappeared, no rationalization on its indestructible origin can bring it back. Nobody can blame the people. The short step has been taken from the sublime to the ridiculous. That a monarch should work, and word hard, for the acceptance and veneration which his dynasty has traditionally received, is a contradiction to the very idea of legitimacy. His claim to rule is no longer based on legitimacy as an inalienable quality, but stands on his own merits. A dynasty is no longer *angestammt*—an untranslatable term, implying essentially legitimacy—once it has been ejected by the people. As the sharp-tongued Hungarian democrat Rustem Vámbéry phrased it: "Exiled monarchs are no more capable of restoring their legitimacy than a maiden her lost virginity." <sup>6</sup>

## RATIONAL JUSTIFICATIONS OF MONARCHY

All irrational arguments in favor of monarchy—legitimet and traditional, romantic and mythical, transcendental and theological—appeal to faith and are beyond proof. However, the common man, emerging from the mechanized mysticism of the dictatorships, will be more or less immune to cheap metaphysics and fraudulent transcendentalism, fed into him by the propaganda machines of the dictators as a screen for corruption, rapacity, irresponsibility, and even insanity. He will turn to political arguments which can be grasped by everybody's reason. The theory of monarchy, progressing with the times, has not failed to turn out a set of utilitarian justifications which focus on the alleged functional superiority of monarchy over the other forms of government. Equally weary of the personalized power of the strong man, whether Führer, Duce, or Caudillo, and simultaneously remembering his own inability to make democracy work, the common man may be well disposed toward a political organization which promises him stability and leadership without demanding the sacrifice of his birthright of freedom. This is precisely what the advocates of a limited monarchy under a decent dynasty seem to offer him. They claim for the institution a singular utility which is compatible with the frame of parliamentary democracy. The *raison d'être* of monarchy, it is asserted, lies in its functional expediency.

## THE MONARCH AS NEUTRAL POWER

The king as neutral power was the convincing formula for winning over the bourgeois middle classes to a chastened and yet essential monarchy. It was evolved by Benjamin Constant, one of the most astute political thinkers of modern times and the inaugurator of the theory of constitutionalism. Constant recognizes four powers in the constitutional state: the royal, the executive, the legislative, and the judicial.<sup>7</sup> His creative contribution to the customary tripartite separation of powers is the distinction between the executive power, which belongs to the ministers of the government, and the royal power, which

he attributes to the crown. Although he acknowledges indebtedness to Stanislas de Clermont-Tonnerre, twice president of the French Constituent Assembly of 1789 and a leading liberal of his time, his is the merit of discovering this distinction in the contemporary British constitution, a full generation before Bagehot. It is the utmost possible refinement of the mechanistic constructions of the political order in which the eighteenth century excelled. Constant is aware that the real test of any political system comes when it is in disequilibrium. ~~The~~ smooth operation of political dynamics is dependent on the cooperation of the three habitual powers; but if they are disarranged and in conflict there must be a neutral power which adjusts them and ranges them again in the preestablished harmony of their cooperative order. If one of the three established powers were charged with the function of stabilization it would become the superior of the other two. The neutral power, therefore, falls naturally to the crown.<sup>8</sup> Britain is the model. The neutral power must be "preserving and repairing without being hostile" (to the others). The executive can be removed by the king without being persecuted or punished. Changing the government by dismissal of the ministers is likened to dissolution of the parliament, without involving violence or disturbance of normalcy.

It was a tremendously clever scheme. It took the authoritarian sting out of the monarchical principle while restoring to it, after the humiliations of the revolution and the *capitis diminutio* of limiting it by a constitution, the dignity and self-respect of an institution not only useful but essential to the state. It justified the monarch's existence in a parliamentary and democratic state since otherwise he had not attributes of importance; and it became the peg on which the ceremonial and representative attributes, the "rights of majesty," could be conveniently hung. It streamlined the entire institution to fit modern democracy. The king is constitutional and bows to the will of the people as expressed in general elections and translated into parliamentary majorities and cabinets. None the less his function is indispensable as the stabilizer of party politics, at the



same time catalyst and bulkhead of conflicting forces, the gyroscope in the oscillating fluctuations of public opinion, pressure groups, and factional interests.

The importance of Constant's constructive revision of the monarchical position can hardly be overestimated. Not only that it became, as Jellinek says, "the natural law of liberalism";<sup>9</sup> it is the cogent and convincing basis on which constitutional monarchy of the Western parliamentary type was evolved and still is operated today. The concept of the king as the neutral power subsequently could be used to raise him to the function of the supreme arbiter between the other powers of the state. It fitted modernized monarchy into the concept of the sovereignty of the people; the crown submitted to it and simultaneously integrated it. The *pouvoir neutre*, or *pouvoir modérateur*, is the principal rational justification of monarchy in our time.<sup>10</sup> Through it the king regained a substantial share of real political power. It was not difficult to build around this rational core of utility all or most of the emotional elements inherent in monarchy, particularly the idea of legitimism, reduced to the assumption that a hereditary ruler, properly trained and carefully groomed for his office, endowed with the historical prestige of a dynasty, would be the ideal person for exercising the impartial function of the invisible moderator and stabilizer of party politics. Indefinite and vaguely circumscribed as this formula was, it was elastic enough to be expanded or reduced in a specific country in accordance with local requirements. Thus Max Weber limited the utility argument to the purely negative assumption that monarchy is necessary, at least for Germany, because it assigns once and for all the supreme position in the state to a definite person, and thus withdraws it from the strife of parties and the ambitions of the politicians.<sup>11</sup>

#### MONARCHY AS SYMBOLIC INTEGRATION OF THE STATE

On the other hand, the justification of the monarchical institution as neutral power could readily be expanded into the more recent version—both rational and emotional—that the

king symbolizes the unity of the state and functions as the indispensable point of crystallization of the people's desire for loyalty and devotion. The common man has a primitive craving for personalized leadership and wishes to be impressed by glamour. A people that has a well integrated and respected monarchy to satisfy these demands would not turn to dictatorship.<sup>12</sup> Of this argument so much is correct: that, in the rational climate of the Enlightenment and the nineteenth century in which the institutions of modern democracy were developed, the value of political symbolism for the integration of institutions was badly neglected; and that modern dictatorships, consciously, deliberately, and even artificially, created and used symbolism as an emotional stimulant of their own values.<sup>13</sup> But the symbolization and integration of a political system does not need to be centered on a specific person. Democracies, although far inferior to monarchies and dictatorships in the mobilization of political symbols, demonstrated that the same effect can be achieved by suitable abstractions, if only they are surrounded by a consistent official sanctification. National heroes and national glory in the past, or expectations in the future, such as the manifest destiny notion, may well serve the same purpose. That republican democracies are by no means devoid of patriotic emotionalization is evidenced by Switzerland: a country averse to stagecraft and monumentally drab in its ceremonial functions, but second to none in attachment to its form of government. A self-confident and militant political democracy almost automatically develops adequate techniques of symbolization.

Nor can it be said that monarchies have been or will be more immune to dictatorial infection than democratic states. The evidence is to the contrary.<sup>14</sup> At any rate, the success of a restored monarchy in integrating and symbolizing national unity is less dependent on the persuasiveness of theoretical assumptions than on the acclaim with which it is received; and this, in turn, is conditioned by sociological factors, primarily the classes which support it, and those which remain unreconciled to restoration.

## MONARCHY AND HIERARCHY OF OFFICIALS

Other arguments justifying monarchy from the functional or utilitarian viewpoint are summarized (without, however, being endorsed) by James Bryce <sup>15</sup> as follows: Monarchy is more stable and better suited to pursue a consistent policy in foreign relations; it provides a more efficient domestic administration; the monarch as the single head is better obeyed by all; it promotes social justice. However, none of these premises is tenable in the light of recent history, though, under singularly gifted rulers, some or even all of them were achieved in a more distant past. Generalizations of such nature are more easily advanced than proved or disproved. Bryce knew nothing of modern Caesarism, which has done more for the masses than any monarchy, traditionally conservative and inclined toward the vested interests, is able to do. The Prussian monarchy stubbornly held fast to the unfair three-classes electoral law, which was a main contributory cause of the alienation of the masses from the monarchical regime in general. Internal stability is probably as great in democracies as in monarchies. The influence of the crown in the conduct of foreign affairs has suffered considerably as the general dynastic idea has shrunk; dynastic solidarity today is only a shadow of its past. Victor Emmanuel and the Balkan kings did not prevent their governments from siding with the Nazis. But at least one argument is substantial enough to merit closer analysis. Monarchy claims to integrate better the official hierarchy of the state and, consequently, to give a more efficient administration. The argument, appropriately focusing on the importance of the bureaucracy and of the military establishment for the modern state, cannot be dismissed summarily. When absolute monarchy transformed itself, in the eighteenth century, into enlightened absolutism, the king claimed to be the first servant of the state, the highest magistrate in the hierarchy of offices.<sup>16</sup> From this viewpoint monarchy is functionally justified in that the king, having become an organ of the state, fulfills essential functions as the titular and factual head of the state administration. Un-

doubtedly the undisputed superiority of bureaucracy in Central Europe was based less on its better training than on its better morale, predicated on loyalty to the office through loyalty to the crown. A firm tradition of incorruptible efficiency could develop because the king had a free hand in selecting officials and enforcing responsibility. A hierarchical system which naturally and organically culminated in the king was definitely preferable to the random selection of the public service personnel under the elective processes of the young democracies (to say nothing of the spoils system). In Prussia-Germany sociological techniques of selecting the higher officials from among the nobility and the high bourgeoisie secured a political homogeneity of the bureaucracy which, even after it had been broken up as a closed caste, continued to identify loyalty to the office with allegiance to the crown. The old families of Prussian officials served the state through serving the crown. Consequently, whenever a state, after its transition from monarchy to the republican form of government, neglected to "purge" the officials, it had to reckon with the latent and lasting opposition of many of the officials to the new regime. This is the invariable experience of new republics, demonstrated by France after 1870, Germany and Hungary after 1918, and Spain after 1931. In this sense all monarchies utilized loyalty to the person of the ruler as an effective stimulus to bureaucratic and administrative accomplishment. Napoleon I acted on this when he re-created officialdom after the breakdown under the French Revolution. The strength of the established continental monarchies was drawn largely from traditional loyalty of the public servants.

However, the argument has lost much of its historical validity. Republics and political democracies learned from the experience with bureaucracy under the monarchies. Bureaucratic efficiency did not suffer because loyalty to the crown, as the apex of the official hierarchy, was supplanted by devotion to function or office. Neither the civil service of Great Britain nor that of the French Republic was inferior to its counterparts in monarchical states. The administration was technically as in-

corruptible under the Weimar Republic as under the Empire, and this in spite of considerable political patronage of the parties. Loyalty to the official function, divorced from its original monarchical foundation, had so grown into political neutrality that the civil service in Germany served with equal technical efficiency the Empire, the Republic, and the Third Reich. Corruption entered into German officialdom only when the Hitler regime infiltrated into it party officials and party appointees without technical and moral qualification for office. Today efficiency of the public service and loyalty to office are largely independent from the form of government under which they operate. It is unlikely, to say the least, that public servants would work better or more devotedly under a restored monarchy than under a self-respecting republic, so long as this continues in its refusal to tolerate officials disloyal to the democratic principles of the state.

#### MONARCHY AND THE MILITARY ESTABLISHMENT

However, while the justification of monarchy as the integrating element of the public administration may be inconclusive, it becomes positively dangerous when applied to the military establishment. No other branch of state activity in Europe has retained such residues of the feudal state as the armed forces. Because military service is primarily obedience, for the corps of officers the loyalty to a monarch, to a dynasty connected with past military glory, or at least to a living person symbolizing military traditions and aspirations is still a more tangible value than devotion to the abstract idea of the state or to a constitution. The reasons are sociological; in monarchical states a goodly number of the commanding officers are taken habitually from the ranks of the nobility. The officers as a rule are monarchists. Even in republican France the monarchist element in the general staff and the higher army administration was strong. Among professional officers few if any have rebelled against their legitimate rulers, while they are hard to reconcile with a republican or democratic regime superseding a monarchy. The Bolsheviks knew what they were doing when

they re-created the corps of officers from scratch, retaining only such Tsarist professionals as could prove their loyalty to the new order.<sup>17</sup>

The Weimar Republic, on the other hand, criminally neglected the most elementary precautions and permitted the imperial generals to reconstruct the Reichswehr in the image of the imperial army. Protected by the official myth of political neutrality, the recruitment of officers and men, both professionals, from among classes opposing the Republic—the enlisted men preferably from conservative agricultural groups—resulted in the profoundly antidemocratic mentality of the military establishment, paying mere lip service to the Republic which it despised.<sup>18</sup> It was not surprising, therefore, that the command of the Reichswehr readily swore personal allegiance to the "Führer" when Hitler, on August 1, 1934, abolished the office of president and merged it with that of chancellor. The collective breach of a solemnly undertaken oath on the still existing constitution—an act of mass treason for which there is no parallel in modern history—bears out the preference of the military establishment in countries with a strong monarchical tradition of personified authority to authority based on an abstraction. Attachment of the officers to the monarchical institution is similarly deep and consistent in Italy, Spain, and Greece.

In case of restoration the dangers inherent in the affinity of the monarchical and the military establishment are obvious. Probably any move for its restoration can count on the support of the professional officers; of all professional groups, they would be least inclined to oppose it actively. Only with the support of the army could a restored monarch maintain his regime against republican and democratic opposition. Such support, of course, would not be unilateral; it is predicated on the expectation or on pledges that the monarch will avoid disarmament with its resultant unemployment of the officers, who are singularly unadjustable to other professions. Any king restored in Central Europe would insist on being commander-in-chief. He would see to it for the sake of his own security, if for

no other reason, that at least the military cadres remained intact. A king who would turn against the military establishment of his country, has yet to be invented. It is clear that, at least in Germany and her satellites, restoration would gravely imperil continued disarmament and the elimination of militarism (dynastic history is military history, and *vice versa*), internal democratic regeneration, and international peace. Permanent disarmament of a monarchy is much more difficult than of a political democracy. Restoration, therefore, would be more than harmful, it would be dangerous. Once more, internal self-determination cannot be divorced from international security.

## CHAPTER IV

### *Preview of Coming Events: The Chances of Monarchical Restoration*

More dynasties have fallen from power since 1918—not counting those driven into exile by Hitler—than are still on their thrones.<sup>1</sup> Will the brave new world be treated to the spectacle of a horde of discarded monarchs and pretenders riding into power on the crest of the democratic wave, the Atlantic Charter flying from their battered mast?

#### FAILURE OF RESTORATION MOVEMENTS IN MODERN TIMES

However, the fate of restoration movements in our time is comforting. Since 1789 very few restoration efforts have succeeded over a considerable length of time.<sup>2</sup> Even before, after the Cromwellian military commonwealth, the Stuarts were able to hold the throne for less than three decades. But after the expulsion of 1688 they kept up the race until they lost the battle of Culloden (April 16, 1746), more persevering in their efforts than any modern restoration movement, partly because in their period monarchy was still the paramount form of political organization, partly because they were more skillful in enlisting diplomatic support and dynastic solidarity. Subsequent restorations were short-lived; in no case could an old dynasty intrench itself sufficiently in the hearts and minds of its people to endure. Monarchy restored after a republican regime maintained itself over more than a generation only in Spain, where the Bourbons succeeded the abortive republic of 1873-74. Perhaps the astounding stupidity of the returned rulers contributed to the

See pp. 453-455 for footnotes to this chapter.



almost universal failure of restoration. After a long and impatient wait in exile they seemed to be unable to realize that, whatever the cause of their fall and redemption, the clock could not be put back. Psychologically understandable as their resentment may have been, they ignored that they had not returned to the same people. Ferdinand VII of Spain, restored at Napoleon's fall, is an outstanding example of reactionary self-stultification. The Bourbons in France could have lasted after 1815; the tired and dispirited country was prepared for a limited and self-limiting monarchy, had the dynasty understood that neither the memory nor the accomplishments of the revolution could be wiped out. But the wine of legitimism is heady and Louis XVIII and Charles X felt and behaved like rulers of the bygone *ancien régime*. They lasted only fifteen years. Likewise ephemeral was Louis Philippe although, realizing that the past was irretrievable, he bowed to the principle of popular sovereignty. By then the French nation had become ripe for self-determination without monarchical tutelage. Napoleon III's regime was not a dynastic restoration based on a hereditary legitimacy. A *reprise* of the democratic Caesarism of the great Corsican, it had little in common with legitimate monarchy except the outward forms; the Bonapartes were at best a revolutionary dynasty. Louis Napoleon Bonaparte, a politician-statesman not unworthy of the genius of his uncle, embarked on the Second Empire under auspicious circumstances. France was contented and prosperous through by far the greater part of his regime; but a nation which had tasted the bittersweet fruit of sovereign self-determination would not abide, in the long run, even by a benevolent absolutism. In its last decade the regime earnestly and sincerely strove to liberalize itself; but, as in all other Caesaristic dictatorships, adventures in foreign policies undermined the confidence of the people. Sedan was the Waterloo of Napoleon III. After 1870 conditions for a Bourbon restoration were favorable enough; but the stubbornness of the pretender spoiled his chances. Later the royalist movement in France never dared to stage a coup; in spite of its brilliant literary advocacy and of

deep-rooted royalist attachment among the nobility and the army it never had more than a nuisance value which even made it welcome as a leaven to the political routine of the Third Republic. Wisely the French exiled their royal families after 1884.<sup>3</sup> The Weimar Republic, more generous, permitted their former ruling houses inside Germany and even a Hohenzollern prince in the Reichswehr.

Of all monarchs deposed after the First World War, only Charles of Habsburg attempted to regain his throne in Hungary (March 27 and October 21, 1921). Twice he failed, partly because of the threatened intervention of the Little Entente which ultimately compelled Horthy's government to enact the Dethronement Act of November 6, 1921. The new Hungarian ruling class (no longer the royalist magnates of the period before 1918) was not disposed to share political power with a monarch in whose competence it had little confidence. None of the German rulers made an active attempt at restoration. What the masses of the German people thought about the princes was revealed by the storm of indignation when it became known in 1924 how they had tried, at the expense of the taxpayers, to recoup their losses in the inflation.<sup>4</sup> The signal failure of restoration in our time is also due to lack of the support previously given to it by the rulers of other countries on the ground of dynastic solidarity. Restoration after this war will have a better chance only if it can enlist the sympathetic diplomacy of Great Britain, the only monarchical state among the Great Powers.

#### SOCIAL CLASSES FOR AND AGAINST RESTORATION—A DEMOCRATIC MONARCHY?

Modern pretenders seem to be lesser fools than their august predecessors. They too study history. They seem to be prepared—at least in the democratic countries of their refuge—to descend from the dizzy heights and stretch out to the common man a calloused hand no longer perfumed with the sacred oil. In short, monarchy of the future promises to be democratic.

Kings are no longer glamorous. True, at rare occasions

when functions of state demand the traditional splendor, a king will perform as an actor, crowned and sceptered, robed in ermine and riding in a golden state coach drawn by four or six white horses while he thinks longingly of his comfortable Packard or Hispano-Suiza. Kings no longer eat from golden plates (a privilege reserved to the worthless rich of this country in the gay nineties), no longer sleep in silken beds. Simplicity, in most cases genuine, dominates their private life. The nations of Western Europe and Scandinavia esteem their rulers as good fathers of families, plain in tastes, bourgeois in habits, like the average man, with nothing of the playboy about them. The European public knew about George II's enrichment of himself, and resented Carol's shady deals and Edward's luxury cruises. Kings behave like and mix with the people. It could not be otherwise in a democratic world. The great popularity of some of the rulers of German states before and after 1918 was due to their simplicity and bourgeois ways. Where the Spanish court ceremonial prevailed, as in Austria under Francis Joseph, or where the monarch indulged in provocative exaltations of his mission, as did William II,<sup>5</sup> the cleavage between nation and ruler was never bridged. The old gentlemen who rule the Scandinavian monarchies do not need bodyguards or secret police when they go shopping or ride in the park. The success of the British monarchy is largely due to the thoroughly bourgeois style of the old Queen and of King George V. The more inconspicuous the wearer of a crown, the more safely it sits on his head.

The younger aspirants to kingship *in partibus infidelium* conform to the pattern. Courtiers and partisans praise their modest, unassuming, "democratic" way of life, their simple tastes, their abhorrence of pomp and circumstance and luxury. When in exile, they ride in trolley cars, eat in unpretentious diners on the road, and otherwise behave like ordinary people. It is a sign of democratic reformation to have worked as a mechanic in River Rouge or even to have obtained, like other mortals, a doctor's degree; this their flunkies consider as a tremendous intellectual achievement—which it may well be for

them.<sup>6</sup> Propaganda "humanizes" them; democratic leanings are a good omen for the coming millennium of the democratic monarchy. Since an inclement Fate has restricted the choices among eligible princely families, even marriage requirements are relaxed. The Habsburg tribe always had an inclination toward commoners as marital partners. The present British king is married to a wife who in earlier centuries hardly would have qualified. Today's pretenders do not show the faintest traces of the "princely education" of former periods—confined to military matters and indoctrination with the prestige of their exalted position, and training as peculiar specimens of the human animal. Most of them are said to be pleasant, well groomed, and well informed young men who, if they had not been born with imaginary crowns on their little skulls, would find a place in civilian life without difficulty. Their affable manners have ingratiated them with the society in London and Washington—Americans as a rule are gullible and easily impressed by titles, real or fake. All this makes an impressive "build-up," to the effect that kingship in our time has reformed itself, that the magic of royal descent has become invisible under democratic skins, that a democratically minded pretender must be, and therefore will be, a democratic ruler.

But, one may ask, can he be? Benjamin Constant could well proclaim, referring to William III in England, that "the prince freely elected by a nation is strong in his former position and his new title." For the sake of argument, let us assume that in a particular country a monarch is restored to the throne by a free and honest plebiscite, or by a majority in a constituent assembly. But no honest plebiscite could ever result in a 99 per cent acceptance by the voters—as in the Greek laboratory test of 1935–1936. Thus, the king after the restoration is bound to lean heavily on a legitimist party or on those social groups which have favored his return. On which groups can he count? Of course the situation varies from country to country so that it is impossible to forecast with any degree of accuracy; but it can be said that those groups will support him which expect furtherance of their own interests by the restoration. Natural

allies of the crown are the officers of the army (particularly of an army disbanded or in danger of being disbanded), some high government officials and others tempted by tangible benefits, but certainly not the majority of the government employees; some intellectuals for romantic or rational reasons. Big business? It has no political convictions. Probably it can be induced to support the monarchy by the belief that the king is strong enough to protect it against the demands of labor and the anticapitalist trend in general. Of crucial importance for any restoration, however, is the attitude of the landed interests, which in many European countries are identical with the nobility. No monarchy can exist without a nobility of birth, wealth, or merit. Napoleon I, who knew as much about human nature in politics as anyone, created a nobility of military and civilian merit of his own, since the aristocracy of the *ancien régime* for a long time was reluctant to join the usurper. It is impossible at this time to know how much of the traditional aristocratic strata, or the landed wealth, as the natural economic prop of monarchy will be left after the war. But it is on elimination of the landowners in Germany (the Junkers, as they are commonly though erroneously called), in Poland, Hungary, the Balkans, and Spain that the economic rehabilitation of most of these countries will depend. Resolute, deliberate and complete agrarian reform, with division of the large estates among free peasants cultivating their own soil, is indispensable for their democratization. The king will be caught here on the horns of the dilemma: Unless he promises distribution of the agrarian wealth accumulated in the hands of the few, he will not be elected. If he is faithful to his pre-induction pledges of social justice, he must side with the landless masses against the class which constitutes his main support. He must choose between antagonizing them and deceiving the people. What will he do?

The other natural allies of restored monarchy are the Catholic church, which in Austria, Spain, southern Germany, and Italy possesses considerable land and therefore shares the interests of the landowning group. The same is true, though to

a lesser degree, of the Orthodox church in the Balkans. It is inconceivable that devout pretenders like the Habsburgs, the Bourbons, or the Wittelsbachs would dispense with the active support of the clergy or refuse to reward them for services rendered. Such affiliation would give the restored regime a cachet which by no stretch of imagination could be called progressive, democratic, or even liberal. In no case would the Catholic hierarchy throw its weight behind a pretender suspected of being a freethinker, a liberal, a Jeffersonian. Only a devout monarch could win the support of the conservative farmers. Thus the feudal elements in any state will line up in support of the restoration and the new regime, an alliance of the reaction—against the people. The most ambitious blueprints dream of a string of Catholic kingdoms in the heart of Europe, embracing Italy, southern Germany, Austria, Hungary, a sort of neo-Guelph League of Nations under the leadership of the Pope, affiliated with Catholic Spain and clerical Portugal and through them extending its sphere of influence to the Catholic peoples of the New World.

From the start, therefore, restored monarchy will be slanted toward the right, toward the propertied classes interested in the maintenance of the *status quo*. Their existence is endangered by the program of social justice with which the crown must win the masses. Constant's concept of the monarch as neutral power—logical, clean, convincing, of typically French lucidity—has only one defect: that it is constructed in a sociological vacuum, that it disregards human nature and the social forces shaping the political order. An established and universally accepted monarchy may well be the arbiter of the conflicting interests and power groups within the state, standing above, or, more correctly, below the parties and conforming to their political dynamics. But the concept of the constitutional monarchy is applicable only to a state in which the institution of monarchy is accepted without challenge. The monarch, restored against republican opposition is caught in a vicious circle. Even if he would like to favor the underprivileged, he could not be anticlerical, anticapitalist, antiprivilege because these are the

classes on which the security of his regime rests. The masses of labor will be, and will remain, as hostile as the landless peasants if agrarian reform is withheld. Marxism of all persuasions has been basically antimonarchist even though the red of the spineless German Social Democrats was badly tainted by the purple. The British Socialists are indifferent to monarchy because the chastened king can do no wrong and no harm. Hitler in Germany-Austria, and the satellite puppets, have done all in their power to discredit the monarchy of the past. To the average worker of the younger generation in Central Europe monarchy means less than nothing; to the older age groups very little. The king's claim to be the neutral power would be beyond fulfillment even if he sincerely wished to live up to it.

#### THE ECONOMIC POSITION OF MONARCHY

To these difficulties must be added another. What will be the economic basis of the restored monarchy? The popular assertion that a monarchy is more expensive than a democracy is subject to qualifications. Frequently the cost of the ceremonial functions of the ruler is borne by the state treasury and not by his civil list. A democracy too must spend money for representative and patriotic purposes. But the monarchy must at least be well-to-do. Though not all established monarchies are rich, most of them have beyond the civil list granted by the state, considerable property of their own: land, palaces, current revenues from estates, and mobile capital. William II, controlling the vast properties of the Hohenzollerns, prudently administered by Jewish bankers, was in his time the richest man in Germany after the cannon king Krupp, and one of the richest men in Europe. Likewise wealthy were the Habsburgs, and some of the minor German dynasties. The lenient Weimar Republic allowed them to raid the taxpayers' pockets in the scandalous suits designed to obtain revaluation of their losses in the inflation. How their property fared under the Hitler regime is not known; but it seems that no wholesale confiscation took place, probably because their coordination

with and support of the Nazis was more important than their money. In Austria the situation was different: at an early date the Socialist authorities passed a statute expelling the house of Habsburg-Lorraine from Austrian territory and confiscating its properties.<sup>7</sup> The value of the confiscated properties was to be used for the relief of persons made destitute by the war. On the other hand, the state took over claims of persons formerly in the employment of the Imperial family, a considerable burden on the treasury because of the number of the pensioners and the size of the retinue. However, the Clericals who controlled Austria for most of the interstitial period, well disposed toward the Habsburgs and monarchical traditions, showed considerable generosity toward the Imperial family and made possible for them at least a dignified existence in exile. In 1935 the authoritarian clerical government of Schuschnigg repealed the anti-Habsburg laws, in readiness for the planned restoration; sizable properties and revenues were returned to the Imperial family. What the Nazis did with them after *Anschluss*, is not known; but it may be taken for granted that the pretender was cut off from his Austrian income. In Spain likewise Franco restored the vast properties of the royal family in full. They would be ample to carry the financial burden of a dignified monarchical regime in the future.

It is obvious that a monarchy desiring to live up to the expectations of the office should not be poor, or dependent solely on the income of the civil list. The impoverished states after the war could not bestow lavish emoluments on a restored monarchy without arousing the envy and antagonism of the presumably considerable republican opposition. Moreover, it should be borne in mind that a dynasty admitted to the throne must try to regain its previous social position by a vast patronage, which in many Central European countries constituted its strongest support. Titles and decorations alone will not be sufficient unless supplemented by economic advantages coming to certain groups from independent royal revenues. How can the indispensable economic basis of monarchy be re-created without returning to the former royal own-



ers the expropriated estates on which the republican regimes settled independent farmers? What mobile capital the exiled families have preserved in the safety of British and American banks will in no wise suffice to maintain a royal establishment in dignity. A ruler may be simple in his personal life, but monarchy must be conducted with regal splendor even though its style be somewhat less than Hollywood. The dilemma is serious. Either the economic basis of restoration will remain precarious, or, by repossessing himself of his former landed properties, the king will set a vicious precedent against agrarian reform. The financial overtones of resurrected legitimism are definitely unpleasant.

#### THE ARGUMENTUM AD HOMINEM

It would not seem fair to press too far the popular argument against monarchy based on heredity and the biological conclusions drawn therefrom; but in an age which has become sensitive to the political implications of eugenics—no people under Nazi domination could escape them—they cannot be ignored altogether.<sup>8</sup> All older dynasties have shown a shocking number of psychopathological features and a frequency of insanity which, unless eugenically outbalanced by a thorough hybridization with fresh blood, would seriously endanger the chances of more healthy progeny. The Wittelsbachs with two successive legitimate rulers who were at the same time held in solitary confinement for incurable insanity (Ludwig II and Otto) have a record unique even in Europe.<sup>9</sup> The British ruling house of Saxe-Coburg and Gotha, dating from the accession of King Edward VII in 1901 and rechristened Windsor in 1917, seems to be remarkably free from mentally unbalanced members. Of the Hohenzollerns, an otherwise rather intelligent family in terms of common standards, at least one recent ruler died insane (Frederick William IV). Over a period of centuries the Bourbon line in Spain has not produced a single outstanding individual, the latest king, Alfonso XIII, having been of particularly bantam weight. Frederick Augustus III of Saxony, one of the most popular rulers in Germany before and even

after 1918 because of his dry wit, was a habitual drunkard. However, the Saxe-Coburg-Gotha family has given Europe a string of ruling houses of a seemingly much sounder and stable stock. The prolific Habsburgs, though free from glaring cases of insanity, have been conspicuous for the absence of over-average individuals. Perhaps with the exception of Joseph II, dubbed "the people's Emperor," and duly emblazoned by patriotic propaganda, it is an endless succession of intellectually drab, bigoted, and dull-witted specimens.<sup>10</sup> The inordinately long reign of Francis Joseph (1848–1916) is generally recognized today, except by the court historians, as the greatest misfortune that could have befallen Austria-Hungary and Europe as a whole—because he was responsible for preserving the semifeudal system of government and administration, which finally started the First World War and exploded Europe. But the point need not be labored.

However, the *argumentum ad hominem* becomes real when one considers that the pretenders in their majority are young men who not only carry the prized heritage of their dynasty but are permeated by the activism of their age and generation. It is only human and natural that one should wish to be a king and ruler in fact rather than the seismographic recorder of parliamentary events. Even the most democratically minded ruler, scion of an old dynasty, could hardly so divest himself of family tradition as to bury his personality in his office. Once on the stage he would wish to play a prominent part on it. He would not care to sit only in the prompter's box, not even listed in the cast of characters. In the constitutional monarchies of Western and Northern Europe the king can be the invisible moderator of party politics because he is universally accepted and respected; these countries had no republican parties such as restored monarchs elsewhere will have to contend with. A pretender of an old dynasty must and will try to restore, together with the dynasty, its traditional power. This, of course, is understandable; but it will render the institution of monarchy controversial from the start, and will make it well-nigh impossible for the king to rule above, or even

under, the parties. Why otherwise should he wish to be restored?

What is to be found, one may finally ask, in the recent record of the royal families which would recommend them to the masses after the fall of the dictatorships? Did Alfonso of Spain and the pretender help their people against the Franco despotism? What have the Hohenzollerns done to alleviate the fate of their people under the Nazi exploitation? Even though the dignity of a deposed monarch requires silence, the ex-Kaiser's silence signified consent. It has been said that he sympathized with the regime because it broke "the shackles of Versailles." "Empress" Hermine, the officious woman he married after the war, was a frequent visitor in Nazi circles in Berlin.<sup>11</sup> The Crown Prince preferred to live in Nazi Germany, on his estate in Silesia. Prince August Wilhelm ("Auwi") joined the Nazis long before 1933 and occupied a high place in their hierarchy. The oldest son of the Crown Prince was reported to have been killed in the Second World War, in contradistinction to the First, in which the six able-bodied sons of the Kaiser, generals and what not, saved their precious lives behind the front. The heir presumptive, Prince Louis Ferdinand (born 1907), was repeatedly described as anti-Nazi, but did he gain distinction in underground work? The political neutrality observed by the royal houses contains little that predestines them to leadership. Incidentally, the number of members of former ruling families who attained high office in the Nazi party or were leading officials in the Nazi-dominated foreign missions of the Third Reich is amazing.<sup>12</sup> Likewise the upper nobility flocked to the Nazi banner without inhibitions and furnished a disproportionately high number of ranking members of the Gestapo and the party hierarchy. Are the German masses in their docility expected to condone the Nazi contamination of their ruling houses and the aristocracy?

Nor could more democratic edification be found in a perusal of the recent record of the Habsburgs, whose aspirations to the throne are more serious because of the promise of Austrian independence in the Moscow declaration. The monarchist

Schuschnigg government opened the way to restoration. Had Otto (born 1912) possessed the courage of his father, he might well have established himself in Austria before the *Anschluss*, because the countries allied in the Little Entente were busy warding off Hitler and would not have been in a mood to resist a forcible restoration backed by a substantial section of the Austrian people, the government, and possibly Mussolini. Perhaps the Western powers likewise would have considered this as a bulwark against Nazification. But Otto failed to act in time.<sup>18</sup> Had he or one of his four brothers fallen in the fight against the Nazis, the claim of the Habsburgs to restoration would have been better served than by the visiting, as traveling salesmen, of monarchist free movements abroad or the setting up of an "Austrian Legion" in the United States. There is no report that the five sons of Madame Zita, all of military age and probably as able-bodied as others, saw fit to enter the armies of the United Nations, after the scandal of the pretender's private army within the United States Army had been exposed. Perhaps Habsburg blood is too precious to be shed for the liberation of Europe. But it is likely that their praiseworthy zeal for the safety of their own skins will be properly publicized among the Austrian masses in any later campaign for restoration. Any pretender, by leading the underground or dying before a firing squad of the Gestapo, would have immensely boosted the stock of his dynasty. But where is today the valor of the kings, proverbial gem of the monarchical crown?

## CHAPTER V

# *The Techniques of Choosing Monarchy As a Form of Government*

### THE DANGEROUS TWILIGHT ZONE

At first thought it seems easy to place before a people the decision as to whether it wishes to live under a "monarchy" or a "republic." On closer inspection, however, the issue proves to be a complex one, not subject to rational choice. The difficulty is that no intellectual rationalization can illumine the twilight zone in which monarchy dwells: many important points are so vaguely defined that the average voter cannot distinguish them clearly.

No monarch or pretender would admit that he wished to rule absolutely; the people would reject him outright if he did. No dynasty has such magic, no royal personage such appeal as to be trusted without constitutional obligations and restrictions. But "constitutional" monarchy has, as demonstrated before, at least three different types. Even its permissible type, parliamentary monarchy, is based mainly on unwritten conventions and usages and unformalized constitutional practices which defy sharp definition. The lines between authoritarian and democratic monarchy are fluid; the very indefiniteness of the attributions of the crown facilitates the perversion, in any constitutional crisis, of limited into authoritarian exercise of the royal prerogative. It is precisely the vagueness and elasticity of the monarchical establishment which make it attractive to the pretenders and monarchs and their legitimist supporters, and at the same time make it dangerous to the operation of

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See p. 455 for footnotes to this chapter.

democratic processes and the freedom of the people. It is imperative, therefore, that the king or pretender lay his cards on the table and disclose his intentions, letting the people know what kind of monarchy they have to expect. The same result can be reached if the people, before making their choice, let the king know under what conditions he will be permitted to rule, in case the vote is for monarchy. Both alternatives imply a careful consideration by each side. If accepted by both, the conditions of restoration become the contract between ruler and people. Time and again the social contract has been proved to be a mere speculation, a figment of historical imagination, a *quid pro quo*; yet it is one of the indestructible verities of political organization and is wholly in keeping with democratic legitimacy, the only possible foundation of modern monarchy. It is indispensable that rights and duties in the exercise of the royal prerogative be defined precisely, and be embodied in a constitution which is the contractual agreement between monarch and people. No self-respecting people can give the pretender or king a blank check for him to fill out as he pleases, after his enthronement—the people footing the bill. Unless the conditions of restoration are clearly defined in advance, disillusionment, dissatisfaction, disaffection, and ultimate disaster are inevitable.

#### TECHNIQUES OF CHOOSING MONARCHY

A nation may decide on the restoration or the maintenance of monarchy either by a plebiscite or through a national assembly. No provisional government or outside power can decide on its behalf; it must decide for itself.

##### (a) *By Plebiscite*

The most perfunctory analysis of the plebiscite method reveals that, for choosing or rejecting monarchy, it is unsuitable. The people will be asked on the ballot: "Do you wish as form of government monarchy (under a specific dynasty or ruler) or a republic? Mark the desired choice." The drawback inherent in the method is that it does not elaborate, that the

choice is "Either . . . or . . . ." Like a plus-minus or "objective" examination, it oversimplifies and permits no qualifications. Herein lies for many the democratic appeal of the plebiscitary technique. But, for internal self-determination, it is the Procrustes bed. On the monarchical side, at least three variations should be allowed for choice: authoritarian, British, and Western "limited" monarchy. But this is obviously impractical: only scholars learned in constitutional law and history could properly distinguish the three varieties. Even with laborious education of public opinion, and with intelligible commentaries attached to the ballot, rational choice by the average voter would hardly be possible. The outline of the different forms of government would remain for him blurred. The statement of naked alternatives is misleading, dangerous, and meaningless; the required specification of the issue, utterly confusing. The plebiscite should not be used for determining the form of monarchical government or of any government for that matter.

Moreover, who is to formulate the question on the ballot? If the king is the legitimate ruler (as, for example, in Italy), his government will justly claim the right. It cannot be expected to split the issue into its logical parts; no monarch, unforced, will consent to having his powers clipped. If, therefore, the plebiscite is upon the issue "Monarchy or republic?" without amplification, it is implied that the people shall vote for or against monarchy as it has existed in the past, "the same mixture as before." This is precisely what ought to be avoided. Would the Greek people, remembering how their king delivered them to the tender mercies of the Metaxas dictatorship, vote for monarchy "as before," or would they insist on specific limitations of the royal prerogative? But they could not qualify their acceptance of monarchy by the reservation, "but only if the king behaves like a British king." Nor ought the situation to be obscured by the argument that a people, in voting for a certain dynasty, puts its trust in its prestige and does not require a more definite specification of the royal powers. Such a blind date with destiny would degrade the plebiscite to a gamble, resting it exclusively on intangibles, on emotions,

ignorance, nostalgia, resentment. Prince Umberto of the house of Savoy, the "lieutenant general," knew what he was doing when he demanded in November, 1944, that the issue should be settled by plebiscite and not by a national assembly. The intangibles would operate in favor of the monarchy; and once in power the monarch would exercise as much power as he could grab, claiming that he had had these unlimited rights in the past, and that they had now been confirmed by popular election.

It may be contended that, if monarchy must be defined in advance, the same applies to the alternative of the republic: a republic is not necessarily democratic. But the argument is specious: A vote in favor of monarchy preempts the future constitution. A vote for a republic leaves the elaboration of its content to the national assembly. Should this body try to whittle away the royal prerogative, the king could object that the issue had been settled by the people in the plebiscite, and that it was for the national assembly merely to execute the mandate. The plebiscite, it must be repeated, is the most undemocratic method of deciding the issue.

*(b) By the National Assembly*

The only fair technique, therefore, is to submit the issue of the monarchical form of government to a popularly elected national assembly. The advantages over the plebiscite are obvious. In any country where restoration or maintenance of a monarchical regime is a genuine issue, the division will be reflected properly by the political parties. A strong legitimist or monarchist party indicates the strength of the idea. During the election campaign the issue can be fully expounded and defined. Monarchist spokesmen of restoration can be questioned as to their intentions and compelled to show their true colors. The discussion of the problem in the national assembly will clarify the limitations to be placed on the royal prerogative. The education of the voters on the complex issue will progress apace. If those who have elected Monarchist deputies to the national assembly find subsequent exaggerated aspirations of the crown hard to swallow, they will attend to reducing these



when the constitution is formulated under which the crown may assume office. Discussion on the parliamentary level is more conducive to an intelligent solution than discussion in the emotionalized atmosphere of a plebiscite, where the people cannot deliberate and can only decide.

Historical experience indicates that after this war the issue, Monarchy or Republic? will constitute the first task of the constituent assembly, on its decision depends the nature of the constitution to be elaborated. One may turn back with profit to the handling of the issue by the French Constituent Assembly of 1789.<sup>1</sup> Prior to the summoning of the States-General, no republican movement existed in France; the principle and the continuation of monarchy were taken for granted in the *cahiers*. Yet the compelling force of events brought the issue to a head as soon as the National Assembly had emerged from the fusion of the three separately convened estates (June 17, 1789).

The National Assembly was the manifestation of popular sovereignty, and popular sovereignty implied that the king was reduced to a mere organ of the state. At once the Assembly began to work on the future constitution.<sup>2</sup> Its first result was the Declaration of the Rights of Men and of Citizens, proclaiming as the form of government under the Constituent Assembly the sovereignty of the people. Monarchy was constitutionalized and nationalized. Although it took the National Assembly two years to complete its work (the constitution was promulgated on September 3, 1791), the issue of the form of government had been tackled at once. Against this, the inability of the French National Assembly after 1870 to decide between restoration of the monarchy and establishment of a republic delayed for five years the making of the constitution and paralyzed the political reconstruction of France.

Nearly always since 1789, settling the form of government has been left to a national assembly. When the Belgians revolted against the Netherlands in August, 1830, a national congress was elected which, on November 10, 1830, deposed the house of Orange and voted for a constitutional hereditary

monarchy. The constitution of February 7, 1831, laid down the conditions under which royal power was to be exercised; but it did not designate the dynasty. The king had to step into the place provided for him by the constitution; he could neither define his powers nor bargain about them; he accepted what was offered him.\* The Balkan kings too were, as a rule, elected by national assemblies—with considerable diplomatic interference by the powers in the choice of dynasty.<sup>3</sup> Marshal Bernadotte was called to the throne of Sweden by act of the Diet (Riksdag).<sup>4</sup> The procedure was somewhat different in Norway, where, after the separation from Sweden in 1905, the Storting offered the crown to Prince Charles of Denmark. Accepting as King Haakon VII, he simultaneously accepted the constitution of 1814. In an honest plebiscite the voters ratified the choice by an overwhelming majority.<sup>5</sup> Plebiscites are exceptional and should be used for nothing more than ratification of a preceding choice by the parliament.

Generally the content and range of the powers the monarch is to exercise have been determined independently by the parliament or national assembly, and the monarch has had to accept the place provided for him in the constitution. The definite advantage in this is that the nation through elected delegates determines the kind of monarchical system it wishes to establish, and that the constitution, on acceptance by the king and his advisers, becomes a formal compact binding monarch and people. If the offer made by the national assembly is insufficient he may decline it; but by taking the oath on the constitution as formulated by the national assembly he binds himself to the contract, and he must not be permitted to stretch its terms afterward. No self-respecting nation should embark on the experiment of monarchy without such precautions. The ratified constitution likewise binds the republican opposition, which henceforward may seek a change only through constitutional amendment. If after the Second World War a pretender, with the backing of strong legitimist groups, should attempt to force the issue in any country by *coup d'état*, the United

\* See *infra*, pp. 265 ff.

Nations must see to it that the will of the people is not frustrated.

#### RETURN OF THE MONARCH?

With the foregoing prerequisites of democratic legitimacy as basis of the monarchy, the return of a ruler who has been under fire or the arrival of a pretender should be postponed until the nation has settled the issue by plebiscite or, preferably, by vote of the national assembly. In most recorded cases the pretender has been kept out of a country until its decision has been made. This should be the unalterable rule in the future. His presence would make a free and unbiased choice of form of government difficult if not impossible. A government pledged by the king would load the dice in his favor, by administrative pressure, suggestive formulation of the issue for the plebiscite, back-stage influence on the national assembly. The pros and cons of monarchy cannot be openly discussed in the presence of a legitimate king, supported by the military establishment, armed with martial law and controlling the officials. Not even an occupation army or an international commission supervising the electoral or plebiscitary process, could prevent the king from swinging the issue. The danger of a coup by the king is much greater when he is in the country.

True, legalistic application of the unrepealed authoritarian constitutions of Greece and Yugoslavia may have given the exiled rulers a formal right to return to their states immediately upon liberation. Fortunately, the issue which had become an acrimoniously debated controversy, was settled in the nick of time by the establishment of a Regency in each country with the result that the monarchs will return only after the popular decision. King Zog too—although nobody had asked for it—declared his willingness to accept a Regency. Wisely King Leopold III of Belgium likewise decided, upon his liberation from German captivity, to postpone return to his country and assumption of royal powers (May, 1945).

That the pretender should be kept away until the people have chosen freely their form of government holds true in all

similar cases. Passage should be refused to Otto, Carol, Don Juan, every one, until their peoples have decided whether they wish them back or not. To readmit them prematurely would inevitably tend to influence the decision. They would not come as private citizens, but would return in state as future rulers. What other purpose would their return serve? It is unlikely that a pretender of our day, streamlined as he may be, will go on the stump personally. His case may be carried to the people by legitimist politicians and other spokesmen. The propaganda and publicity campaign of a pretender, without bursts of staged emotionalism and other tricks, would necessarily distract attention from the only question involved: whether monarchy is, in our day, a meritorious form of government. Democratic legitimacy, the basis of constitutional monarchy, requires that the king accept the verdict of the people without trying to direct it.

#### CONCLUDING OBSERVATIONS: THE VICIOUS CIRCLE

To many readers in the United States, who know the monarchical institution only from fairy tales and history books, the problem as discussed here may appear to be exaggerated; they will be inclined to consider the case against monarchy as a fight against windmills. But intelligent observers know that in some European countries monarchical restoration is a serious alternative to other forms. The prestige of monarchy has gained visibly from the unity of people and ruler in monarchies of Western and Northern Europe. The monarchical principle has the obvious sympathy of the British government. The success of the house of Savoy, soiled by connivance with the Fascist crimes, in holding onto the throne of Italy cannot but encourage monarchists elsewhere. To not a few, monarchy appeals as a bulwark against Bolshevism. Some of the socialist parties in Central Europe, confronted by the alternatives of Sovietism and monarchism, would unhesitatingly choose the latter. There is less danger that a people, permitted to vote freely and without pressure, will choose monarchy than that monarchy will be foisted upon that people. It seems to be

elementary that the nations under political reconstruction, saddled with the tremendous task of finding their moral, economic, political equilibrium, should be spared the additional and gratuitous tribulations of the monarchical issue which would unduly burden political reconstruction with a heavy mortgage and contain the germs of new internal and international difficulties.

Granted a people's choice, by a technically irreproachable majority procedure, of constitutionally limited monarchy—which, as has been pointed out, is permissible under the Atlantic Charter—as its form of government, and granted peaceful installation of the ruler on the throne, the position of the monarchy will be critical for a considerable time to come. In no country—not in the Balkan states, in Central Europe, or in Spain—would monarchy be accepted with the degree of unanimity which makes it strong in Britain, Western Europe, and Scandinavia. Republican opposition, which the wisest and best intentioned of monarchs could not hope to overcome or disarm at once, would continue. The nation would remain divided over its form of government—and there is hardly a more explosive division between parties than that between monarchists and republicans. Any national reverses or misfortunes would be chalked up against the crown and the institution. The republican minority, biding its time, would strive to become the majority. The continuous tension would tempt the monarch to authoritarian methods or a *coup d'état*, while the republicans would not easily dismiss the idea of a revolution. The congenital defect of monarchy is that it cannot be removed except by force and violence. The record indicates that a restored monarchy—even the most streamlined and democratically minded one—in our time is at the most a transitory solution. It cannot possibly endure. Far from integrating and unifying, it would continuously give rise to political irritation, agitation, restlessness, desire of change. Nor can the international complications be ignored. An upheaval in one state is bound to have repercussions in others. Divergence in the form of government may delay or complicate

regional federalization envisaged by Dumbarton Oaks and San Francisco.

A strong, self-willed, powerful king is dangerous to the democratic development of a people. He is, therefore, a danger to world peace, since internal political affairs can no longer be treated by other nations with the traditional indifference. A weak and powerless king is a luxury, a heavy encumbrance on a state and an invitation to revolution. Though little more than a permanent president of a republic,<sup>6</sup> he is constitutionally irremovable and, therefore, functionally inferior.

Even though permissible as a choice, monarchy is not to be recommended as a form of government. The nations redefining their political existence after the Second World War, and rewriting their constitutions, ought to profit by the lessons of history. The monarchical principle fits badly into the shape of things to come.



*Part Four*

THE "CHOICE" OF THE FORM OF  
GOVERNMENT



## CHAPTER I

# *Political Reconstruction and the Written Constitution*

### RATIONALITY OF THE CHOICE

Article 3 of the Atlantic Charter recognizes the right of every people to choose the form of government under which it will live. Democratic legitimacy is the source and aim of internal self-determination. How does a people "choose" its form of government? It must do so rationally, deliberately, without compulsion, depending on its own volition. Otherwise the choice will not be a genuine one. Since the revolutions of the eighteenth century the customary method of choosing a form of government is for the people to endorse a written constitution embodying the specific type of political order they desire. No people can claim to have chosen its form of government unless this act is articulated and formalized in a written document as instrument and symbol of constitutional government.

### THE STAGES OF POLITICAL RECONSTRUCTION

Such a deliberate and conscious choice of form of government through a new constitution occurs usually after a revolution or a war. Almost invariably, the desire of a people to choose a form of government through the enactment of a new constitution has materialized in the following stages: (1) A government is set up provisionally—that is, with transitory powers—until it has been confirmed by the national assembly, and constitutional normalcy has been restored. Its main func-

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See pp. 455-461 for footnotes to this chapter.

tion is to hold elections for the national or constituent assembly. (2) A national assembly is formed, deriving its legitimacy and its powers from the sovereign people. Its main functions are to control the government, provisional or permanent, and to prepare a constitution. (3) The national assembly elaborates and enacts a constitution, which, at desire, is ratified by the people themselves. (4) A transition takes place from the intermediary regime of the national assembly to the form of government established by the constitution.

These are the four stages through which political reconstruction must pass. In a particular case they may be telescoped—several stages may be compressed into one; but the frame must be maintained if democratic legitimacy is to be satisfied. The free choice of form of government is adequately complied with if it brings the enactment of a new constitution.

#### IRRATIONAL RECONSTRUCTION

It is doubtful whether political reconstruction will adhere so closely to the historical pattern after the Second World War as it did after the First. Economic disintegration, political passions, administrative disorganization, spiritual chaos will result in violent upsets in some countries which will delay the orderly processes of state building. Very likely the tempo and the trend of political reconstruction will vary in the different countries with the effectiveness of the government machinery; with the definiteness of territorial jurisdiction; with the readiness to accept a government-in-exile as legitimate, or the divided loyalties between this and a government arising from the resistance groups inside the country; with the strength of traditionalism, as against desire for innovations; with the influence of foreign ideologies and political techniques, the unifying or divisive forces of public opinion, and many other factors. In countries subjected to military occupation, policies and prestige of the occupying powers may accelerate or retard political reconstruction. Although the impact of such factors is incalculable, we know that Europe has gone through trying periods of political uncertainty before. Properly guided by the

victorious powers, she will find her equilibrium in time; and perhaps the convulsions will be less severe than we fear.

However, it would be unwise to assume that rational reconstruction will take place invariably and in all countries. Popular leaders, acclaimed for valor in resistance to Nazi oppression, have risen to the top with no other legitimation than their personal appeal to the masses of their people. The title to leadership is tested in the fight against the enemy. The irrational magic of the unknown peasant or worker, thrown up by the people in the travail for political existence, will be pitted against the democratic legitimacy acquired by elections or other rationalized procedures. Josip Broz (Marshal Tito) of Yugoslavia and General Charles de Gaulle are cases in point. The militant leader in the campaign for liberation from the conqueror may not be the chosen leader for the time of peace; and he may not be devoted to democratic legitimacy. Soldiers are authoritarian by profession. Conflicts between personal popularity and popular sovereignty may well end in subjecting a people to a political order which it has not "chosen" rationally, and to leaders who will govern wholly at their own discretion. Self-determination by revolution cannot be considered as a substitute for rational political reconstruction: such spontaneous adoption of a form of government is particularly tempting to militant Communists in the resistance movements, who, knowing well that democratic elections will not bring the political system they desire, are prepared to seek power by nondemocratic means. That the Kremlin would discourage them is a dangerous illusion. Even at this early date it is obvious that the activism of the Communist-controlled resistance groups is the first obstacle on the road to normalcy.

History records such nonrational attempts to determine the form of government as the councils of the Levelers during the first decade of the Puritan revolution; the dictatorship of the Convention in France after 1792; Lenin's usurpation of power in 1917; the spontaneous emergence of the workers', peasants', and soldiers' councils, on the Soviet pattern, in Germany in 1918. Are the United Nations, carrying out their promise of

free choice of government in the Atlantic Charter, entitled, or are they even pledged, to object or intervene in order to prevent any such attempt to thwart or distort the will of the people? It is obvious that, if political reconstruction is to be accomplished under the Atlantic Charter, frustration of the free choice of form of government by a people (including all persons qualified) should not be tolerated by the powers that have to assume European stewardship. If the framers of the Atlantic Charter "respect" the right of every people to choose its form of government, they are duty-bound to insist on the requisites of democratic legitimacy. To conform to its requirements political reconstruction must use the technique of elections, representative institutions, and a written constitution.

#### POLITICAL RECONSTRUCTION AND THE YALTA DECLARATION

In this sense the Yalta Conference of the "Big Three" must be interpreted not only as the clear and unmistakable confirmation of the principles enunciated in Article 3 of the Atlantic Charter, but as their implementation by the promise and undertaking to act in accordance with them:

They [the Premier of the Union of Soviet Socialist Republics, the Prime Minister of the United Kingdom, and the President of the United States] jointly declare their mutual agreement to concert during the temporary period of instability in liberated Europe the policies of their three governments *in assisting the peoples* liberated from the domination of Nazi Germany and the peoples of the former Axis satellite states of Europe *to solve by democratic means their pressing political and economic problems.*

To foster the conditions in which the liberated peoples may exercise these rights, the three governments will *jointly assist* the people in any European liberated state or former Axis satellite state in Europe where in their judgment conditions require (A) to establish conditions of internal peace; (B) . . .; (C) *to form interim governmental authorities broadly representative of all democratic elements in the population and pledged to the earliest possible establishment through free elections of governments responsive to the will of the people;* and (D) *to facilitate where necessary the holding of such elections.*

When, in the opinion of the three governments, conditions in any European liberated state or any former Axis satellite state in

Europe make *such action necessary*, they will immediately consult together on the *measures necessary to discharge the joint responsibilities* set forth in this declaration. [Italics supplied.]

#### POLITICAL RECONSTRUCTION AND THE EXISTING CONSTITUTIONS <sup>1</sup>

In some states the choice of form of government may result in continuing the constitution as it existed before the Nazi conquest; in others there was no such serviceable constitution. The issue of the continuity and validity of existing constitutions is important enough to warrant an investigation.

It has been generally recognized in international law—and still is, in spite of the flagrant disregard by the Germans—that military occupation of a country cannot change the allegiance of its people to the legitimate sovereign. Therefore the constitution of an occupied country remains valid, in spite of the conquest and of any unilateral act of the conquering power. All annexations by Germany (Luxembourg, Sudetenland, parts of Poland, Belgium, France) and the various protectorates and dependencies under colonial exploitation were illegal. They could have become legal only by consent after a definitive defeat, which the armies of the United Nations fortunately have frustrated.<sup>2</sup> Once the occupation was terminated, the liberated countries returned to the authority of the legitimate sovereign under the *jus postliminii*.<sup>3</sup> All acts during the occupation which were illegal under international law are automatically rescinded. The situation is mentioned in the second sentence of Article 3 of the Atlantic Charter: "They wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them." This promise the victorious armies of the United Nations have fulfilled.

##### (a) *Western European States*

The constitutions of Belgium, the Netherlands, Luxembourg, Norway, and Denmark were resuscitated without formal action by the peoples or the returning governments. They have remained valid all through the military occupation, in spite of

being suspended, and there is no indication that the liberated peoples wish basic changes in the constitutions, which have met the test of foreign occupation and retained their serviceability for integrating democratic-constitutional government. Broad projects in view for social reconstruction <sup>4</sup> can and will be accomplished within the framework of the existing constitutions.

(b) *Other Liberated Countries*

The situation is decidedly problematic in the other liberated countries. Formally it does not differ from that in the Western constitutional monarchies, and the constitutions that preceded German occupation would automatically be revived. However, the Atlantic Charter's assertion of the right of a people to choose its own form of government is definite, and puts the continuing legal validity of any former constitutions to the test of conformance to the principles of democratic legitimacy. Only Czechoslovakia is in as unequivocal a position as the constitutional monarchies of Western Europe. At the time it was sacrificed to appeasement in Munich, its democratic constitution of 1920 was still going strong. For twenty years the brave republic was a stronghold of constitutional democracy, and democratic legitimacy gives the best of grounds for the resurrection of the constitution. The experience of a constitution which happily combined a strong president with full operation of the parliamentary system might well induce the Czech people to bring it back into force without substantial changes. Past deficiencies in the relations of the central government to the Slovak, Carpatho-Russian, and the Sudeten minorities—the last of whom, it is hoped, will be compulsorily transferred to the Reich to which they have so vociferously claimed to belong—would call for a revision which could comfortably be accomplished by a constituent assembly, within the limits of the existing constitution. The indications are that the Czech people, faithful to Thomas Masaryk's heritage, prefer the existing political democracy to any other form of government.

The situation in Poland, Greece, and Yugoslavia is much

more complicated. At the time of the Nazi invasion none of these had a democratic form of government, to which the people could automatically revert. The Pilsudski constitution of 1935 comes nowhere near satisfying democratic specifications of the "nuclear demands" of political democracy set forth above.\* This disingenuous instrument, pretending to provide a "strong executive," was camouflaged for the semi-fascist authoritarian regime preferred by the ruling oligarchy and the "colonels," which emulated the German regime by brazenly depriving its people of their legitimate share in the government. When the Polish Committee of National Liberation was established under Soviet auspices as the *de facto* government on Polish soil (July 23, 1944), it formally repudiated the constitution of 1935 as "illegal" and claimed to act on the basis of the constitution of March 17, 1921, "the sole constitution that is legally binding and has been legally voted." To fall back on an instrument of government inactive at least since 1926 (Pilsudski's first reform) and proved to be unworkable, would be an innovation indeed. The London government-in-exile insisted on the instrument of 1935, and the only proper solution, thus, would be for the Polish people to choose its form of government by either reverting to the instrument of 1921 or enacting a new constitution. In Austria likewise the Soviet-sponsored government of Dr. Karl Renner is reported to have repealed the authoritarian Dollfuss constitution of 1934 to return to the instrument of 1920, drafted by a National Assembly with a popular mandate.†

The situation in Greece‡ is particularly baffling. After Kondylis' *coup d'état* on October 10, 1935, the parliament, purged of its republican members, swept aside the republican constitution of June 2, 1927, and restored the monarchical-authoritarian instrument of May 23, 1911; it in turn was suspended by King George II in August, 1936. Thereafter, until the German invasion, Greece lived under General Metaxas' harsh dictatorship. Thus the Greek people, now that the Ger-

\* See *supra*, pp. 119 ff.    † See *infra*, pp. 266 ff.    ‡ See *supra*, pp. 145 ff.

mans have been expelled, have no democratic constitution for reenactment; by methods discussed previously, they will have to decide the issue of monarchy or republic, writing the new constitution accordingly.

The situation in Yugoslavia resembles, in many respects, that of Greece. The older constitution of June 28, 1921, was suspended by King Alexander's *coup d'état* January 5, 1929. After two and one-half years of constitutionally unmitigated royal dictatorship the constitution of September 3, 1931, was imposed by royal proclamation.\* A thinly veiled royal absolutism was pointed up with appointive councils borrowed from contemporary dictatorship. This undemocratic instrument has been the legal basis of government ever since. It is wholly in conflict with democratic legitimacy and must be replaced at the earliest opportunity after the war by a genuine democratic order. The Yugoslav royal dictatorship was subsequently imitated in Bulgaria (1934), and Rumania (1938). In terms of the promise and the obligation of the Atlantic Charter and the Crimean Agreement new constitutions have to be enacted in all Balkan states, as former Axis satellites, to reflect the peoples' choice of form of government.

### (c) *Hungary*

In Hungary the elimination of Nazi control and the collapse of the authoritarian regimes of Regent Horthy and the puppet Szálasi poses a dilemma for democratic legitimacy. Hungary, like Britain, never has had a formal, written constitution; its political system is based as much on "conventions" as on statutory formulations, with the guiding concept of the Holy Crown—a symbolic expression for the mystical unity of the Hungarian nation, the king being the head, the estates being the members of the body politic. The doctrine is rather unintelligible to anybody but Hungarian publicists, who claim that it reflects the historical continuity of the nation's political existence. Be that as it may, the concept proved serviceable in maintaining the oligarchic powers of the magnates, and in sur-

\* See *supra*, pp. 147 ff.



rounding the authoritarian regime since 1919 with the aura of a legitimacy far more real than the time-worn Western European theory of monarchical constitutionalism. The Hungarian expositors of this strange blend of theological and secular elements maintain that the peculiar *Gestalt* of the Holy Crown concept is incompatible and irreconcilable with popular sovereignty; that it would lose its identity, and state and nation would disintegrate, if the crown were eliminated. One may doubt this assertion. Nations as a whole usually survive the death of a doctrine which benefits a definite class. At any rate the authoritarian Horthy regime was skillfully adjusted to the basic assumption of historical continuity. The intriguing problem of fitting into this state transcendentalism a genuine democratization may be solved by the Hungarian legal scholars. But the Hungarian peasant is not necessarily a theologian, and he would probably feel compensated for the loss of metaphysical patrimony by ownership of the land on which he toils to the benefit of the squires and an overstaffed bureaucracy. The neutralization of the Hungarian upper class—a particularly rapacious, aggressive, and democracy-resistant group, in spite of its well deserved reputation for personal charm and culture—is a desideratum for the political stability of Europe second only to the elimination of “Prussian” militarism. Hungary, and no longer Czechoslovakia—the Bohemian bastion, in Bismarck’s words—is the key to Eastern Europe. Whether a democratized Hungary after the war will have to enact a formal constitution, or whether the transition can be made in accordance with historical continuity, remains to be seen. At any rate Hungary has never had a constitution.<sup>5</sup> The concepts of the Holy Crown and historical continuity have frustrated all efforts to “freeze” or rationalize the political system in formal documents.

(d) *Germany*

Turning the searchlight now on Germany, we must ask whether, after the Nazi collapse, the Weimar constitution could be automatically revived. The plan, favored in some quarters

interested in restoring the *status quo*, gains superficial support from Hitler's failure to decree its repeal or abrogation as Franco did with the Spanish republican constitution of 1931, or to substitute a dictatorial constitution of his own as the two Napoleons did. The argument has little bearing on the continued validity of the Weimar constitution. Since the essence of present-day dictatorship is exercise of political power, without constitutional limitations, any formalization would be inconsistent: the dictator, being the law, cannot submit to limitation of his political power, which is involved in any constitution, whatever powers it may grant him.<sup>6</sup>

Nor does the survival of the Weimar constitution follow from the fact that it has never been formally repealed. It is characteristic of the Caesaristic dictatorship of our day that it seizes political power under the protection of the existing constitutional order; the *coup d'état* is wrapped in "legality." In Italy the dictatorship was so skillfully fitted into the elastic constitution of 1848 that this instrument of government survived the breakdown of the Fascist regime, though somewhat battered. The underlying reason for installing dictatorship under the roof of the previous constitution seems to be that the dictator at first avoids antagonizing the people, claiming that he exercises only the legal function of a strong executive. This leads to an overlapping of the two political systems. In Germany the situation was further obscured by the fact that the courts continued, until a surprisingly late date, to refer now and then to nonpolitical articles of the bill of rights as valid positive law without open rebuff by the government.<sup>7</sup> The Nazis evaded formal abrogation of the Weimar constitution by enjoining the courts to apply prerevolutionary law only so far as it was harmonious with the principles of the totalitarian leadership-state.<sup>8</sup> Nor can the continuing validity of the constitution be argued from the continuance of certain institutions inherited therefrom (Reichstag, electoral system, and the bulk of laws), because the Nazis perverted them beyond recognition.

No, the Weimar constitution is dead, dead beyond resurrection.<sup>9</sup> It cannot be revived by the argument that the Hitler

regime is illegal in terms of the preceding constitutional order. True, both the access of the Nazis to power and their maintenance in power were tainted with crude illegalities violating the then still valid Weimar constitution.<sup>10</sup> But it is an accepted maxim of constitutional theory and practice that a change in form of government does not destroy the identity of the state, and that a successful revolution creates new law. The new regime cannot be measured in terms of the legal order it dislodged by force and fraud; nor can the prerevolutionary system be revived by the fact that its successor came into power illegally. A successful revolution exercises the original power to create its own legal order, and must be judged by it.<sup>11</sup>

Since 1789 there has been no historical precedent for the restoration of a previously existing order after the disappearance of a regime that succeeded it, with the possible exception of France, the world's political laboratory, in the revalidation of the Constitutional Charter by Louis XVIII after the Napoleonic Hundred Days.<sup>12</sup> The Hundred Days were just ignored. All other French constitutions from 1791 to 1875 were terminated by revolution. Constitutions are not written for eternity; they are destined to violent death. Who would predict what will be the ultimate fate of the United States constitution? When a political system, democratic, monarchical, or dictatorial, has ended, the people governed by it is no longer the same as it was at the beginning. The hands of the clock cannot be put back. In every case the nation enacts a new constitution.

The conclusion arrived at—that the Weimar constitution cannot automatically spring into life after the fall of the Nazis—does not imply that the people could not revalidate it, by a positive manifestation, instead of enacting a new constitution. But it is more than unlikely that Weimar will receive a second trial even though, in the impending process of introspection, it may be viewed by the Germans with less passion and distortion. Perhaps they will discover for themselves that Weimar could have been a good house to live in, but for the wrecking tactics of the extremists of the left and the right and the lack of democratic convictions in its spineless leaders.<sup>13</sup> The constitu-

tion of a democratic Germany—whenever it comes—will probably take many a leaf from the Weimar book.

(e) *France*

The debate as to whether the liberation of France automatically revived the constitution of 1875 should be approached along pragmatic lines. Aside from the point whether the transfer of political power to Marshal Pétain and the Vichy regime in July, 1940, was illegal in terms of the existing constitution,<sup>14</sup> it can be argued on better grounds that that regime became illegal when it failed in its promise to implement the constitutional laws. But the constitution of 1875, even if legally revived, would not be serviceable for political reconstruction. Nor was the parliament in working order. The parliamentarians who had voted in favor of Vichy (they were the vast majority) were collaborationists, as much repudiated by the French people as the discredited last president of the Third Republic, Lebrun, who submitted to Pétain and silently gave way when De Gaulle's provisional government took over. After the liberation France found herself in a constitutional vacuum which the *de facto* authoritarian provisional government of General de Gaulle had to fill. Only elections can restore democratic legitimacy. A new charter may retain the good features of the Third Republic; but—as long overdue constitutional reforms—it must strengthen the executive, with the right to dissolve the parliament, give budgetary monopoly to the government, and provide methods for ending deadlocks between the two chambers. The former constitution needs more than patching. It was largely responsible for the political dry rot of the Third Republic, if not for the military defeat in 1940. A genuine moral catharsis of France demands a new constitution for the Fourth Republic. On July 25, 1944, General de Gaulle declared before the Consultative Assembly that after elections of a constituent assembly a new constitution will be written.

(f) *Spain*

Spain since the fall of the Franco dictatorship has been in **some aspects similar and in others dissimilar to France after the**

collapse of the Vichy regime. Franco explicitly and formally abrogated the constitution of the Spanish republic of December 13, 1931,<sup>15</sup> while the Pétain dictatorship merely superseded the French constitution of 1875. The Spanish republicans base their case on the continuing validity of the constitution of 1931, which Franco's government of force could make inoperative but never could invalidate because of its democratic legitimacy. Moreover, in exile, the Spanish republican leaders and parliamentarians continued to act within the frame of that constitution. Although the formal resignation of the last republican president made it impossible to establish a regular government-in-exile, the permanent commission of the Cortes, provided for by the constitution,<sup>16</sup> continued to meet, at first in Paris and later in Mexico City, exercising as many as possible of the functions of the nonexistent plenary Cortes.<sup>17</sup> Herein lies one of the basic differences between France and Spain. While the French provisional government of De Gaulle and the provisional consultative assembly agree that, regardless of the question as to the continuing validity of the constitution of 1875, it should be replaced after the elections by a new instrument, the resurrected Spanish republic can revert to the constitution of 1931, which, during its relatively brief period of full operation (1932 to 1936) proved sufficiently useful to become the basis of a new republican-democratic order.

#### THE EMERGENCE OF NEW STATES

Should new states emerge from the collapse of the Nazi New Order, new constitutions will have to be written for them. This may be true of Germany, if she is broken up from inside by centrifugal forces, or from outside for reasons of international security. The problem will have to wait until the mood and temper of the German people itself are better known. It may well be that, after the Nazi steamroller has lost its leveling power, the historical cleavages between South and North, between the Catholic and Protestant sections, will reappear with such sharpness as to facilitate a political regrouping. If the particularistic forces among the Germans are strong enough,

after the indispensable period of probation, to justify the experiment, this writer would be in favor of five or six political units tied together in a loose federation; namely (1) southern Germany, including Bavaria and perhaps Austria; (2) Württemberg, Baden, Hesse—to which the Palatinate and the Saar may be added; (3) a western German state including the Rhineland and Westphalia; (4) Hanover,<sup>18</sup> Oldenburg, and the Hanseatic cities; (5) a central German state around the core of Saxony and Thuringia; (6) and the "remainder state" of Prussia, excluded from access to the North Sea and converted to predominantly agrarian pursuits. This scheme leaves aside annexation of German territory by foreign states unless accompanied by complete transfer of the German-speaking population. But it is only too well realized that the advantages of such a plan for the federalization of Central Europe would be heavily outweighed by the insurmountable difficulties of breaking up Germany as an economic entity,<sup>19</sup> particularly since the effects of industrial dislocation are as yet incalculable. The prospect of resurrected nationalism aiming at a new unification of the Reich would not vitiate the scheme of federalization if Germany were placed under political tutelage by the Anglo-American-Russian Triplice for a long time to come.

Whatever may be done by individual nations, it is safe to say that Europe after this war will enter a period of constitution making on a large scale.

#### POLITICAL RECONSTRUCTION AND THE GOVERNMENTS-IN-EXILE

The continuing validity of constitutions should not be confused with the representativeness of governments-in-exile, so much discussed during the war.<sup>20</sup> All the governments-in-exile were recognized early as *de jure* governments and members of the United Nations. None of these could claim continued parliamentary support, because no parliament was in action. However, by some straining of constitutional provisions, a sufficient basis of legality was given to the governments-in-exile of Holland, Norway, and Luxembourg. Because King Leopold did not follow his government abroad, the Belgian situation

was less satisfactory; but even the position of the cabinet under Premier Pierlot was not anomalous enough to make its acts unrepresentative of the will of the Belgian people.

The transition to constitutional normalcy after the liberation offered no difficulties, because none of the constitutions had been invalidated. In the resistance movements of the liberated constitutional monarchies only the Communists objected in any way to the assumption of powers by the governments-in-exile. Belgium is typical in the procedure adopted, although the country suffered relatively little from the war and practically all Belgian parliamentarians except the Rexists and a handful of Flemish Nationalists could assume their functions after the liberation. The first step taken by the reconvened parliament was to install a regency for the absent king, on September 21, 1944. On September 26, Premier Pierlot, who had presided over the Belgian cabinet during the years of exile, formed a new government of the traditional Catholic, Liberal, and Socialist parties, including two Communists, which in due course (October 4) obtained a vote of confidence from the parliament. The Belgian precedent, of the government-in-exile seeking parliamentary ratification and acting as the legal provisional government until general elections can be held, is being followed after liberation by practically all constitutional states.

The position of the Czechoslovak government-in-exile was singular in that the council set up by Dr. Beneš, without a formal mandate from the Czechoslovakian people, based its existence exclusively on moral grounds; these, however, are in practice as persuasive as the letter of the law.

The problem of the governments-in-exile of Poland, Greece, and Yugoslavia was considerably more complicated, and a general statement is hardly possible. Their representativeness of the population in the occupied territories was most precarious, in view of the authoritarian or dictatorial character of the regimes in power before the invasion, and they were repudiated or challenged by large sections of the resistance movements as in conflict with the genuine will of the peoples. The return to

power of these governments, disunited, torn by intrigue, and incapable of disassociating themselves from the former ruling classes, depended on their complete regeneration through the acceptance of members of the resistance movements. The representativeness of any of them rested on the continued validity of the regime on which the government was based. Here is the point where the form of government and the foreign policy became visibly interdependent. Soviet Russia refused to recognize the Polish government-in-exile because of its lack of representativeness. Soviet insistence on "friendly" governments in countries coming within the Russian sphere of influence amounts to a demand that the political system conform with what Soviet Russia considers as the internal constitutional requisites of peaceful international relations. Political reconstruction in Eastern Europe, and perhaps also in Germany, may well be compelled to orientate itself toward the requirements of foreign policy; or, to phrase it differently, the standing of a country in international relations will be commensurate to the confidence its neighbors, and especially the great powers, have in its internal form of government.



## CHAPTER II

### *The Provisional Government*

#### THE NATURE OF THE PROVISIONAL GOVERNMENT

Nobody yet has tabulated statistically the constitutions written since the American and French revolutions inaugurated the custom of drafting a formal document to mark the arrival at independent statehood. All nations, with the single exception of this country, have indulged in several constitutions during their existence as states, and in federal states each of the member states is endowed with a constitution of its own; and so the total number by now must have passed a thousand. The majority of these constitutions were elaborated by specially elected representative bodies, called conventions or national assemblies.<sup>1</sup>

Many new constitutions do not owe their existence to a revolution, violent or otherwise, involving the overthrow of the existing political system, and came into being peaceably and in the normal routine. Constitutional revision was by the regular parliaments.

A provisional government, therefore, is not, by necessity, the concomitant or corollary of a new constitution; it appears only when the transition from one political regime to another is accomplished by violence and by a break in constitutional normalcy. The shift from one political order to another cannot be accomplished without a provisional government, as *ad interim* supreme authority between two periods of constitutional legality. The characteristic feature of provisional governments is their lack of definite legality and merely *de facto* existence.

See pp. 461-464 for footnotes to this chapter.

The emergence of provisional governments is not governed by rational rules. They spring to life by historical accident, produced by elementary forces of political dynamics. Just as varied and uncontrollable are their composition, powers, duration, value. The most unpredictable is the most common. They may be swept into power by a sudden wave of popular emotion, or may take the reins in final triumph after deliberate planning by revolutionary leaders. They are the reward of political activism, or the result of under-cover intrigues or accidental configurations of power. It cannot even be said that a provisional government invariably precedes the national assembly which is destined to assume the supreme power in the interregnum between two regimes. In Czechoslovakia, Poland, and Austria after the First World War national councils came first, and the provisional governments were subordinate to them. More frequently the provisional government appears first on the stage and initiates the assembly to which it surrenders its interim powers. This happened in 1918 in Germany after the breakdown of the monarchical regimes, when the opposition parties formed provisional governments charged with convening national assemblies in the Reich and in all *Länder*. Sometimes provisional governments are brought into existence by an act of the older regime. More often provisional governments mark a complete break with the past and have no visible connections with it. Existence is their only justification. Conditions and circumstances of the provisional governments are so varied that the analysis of historical precedents fails to reveal any definite pattern which could be utilized for political reconstruction after this war.

In recent times political regimes have rarely been able to survive loss of a major war. At any rate it has been deadly for ruling dynasties, as evidenced by France (1815 and 1870), Germany (1918), and Greece (1922). Austria remained under the Habsburgs after the defeat by Prussia (1866), and Tsarist Russia under the Romanovs after having been beaten by Japan (1905); but both regimes had to make concessions of liberal reform. The fairly definite conclusion may be drawn from history that

victorious powers in the past, as a rule, took no interest in the internal form of government of a defeated enemy. Up to the advent of the totalitarian counterrevolution, wars were not fought between "ideological" regimes or forms of government, but between states or, perhaps, between peoples. The doctrine of internal self-determination prevented victorious states from imposing a specific form of government on a defeated state, provided that it retained its external independence; nor did the victors otherwise interfere with the internal self-determination. There are, however, some exceptions. The Allies in 1815 saw to it that Napoleon was no longer available as the ruler of France, and Wellington helped to foist the Bourbons on an unwilling French nation. Bismarck in 1870 forbade Gambetta's plan to exclude certain dignitaries of the overturned Empire from eligibility to the National Assembly.\* The defeated Central Powers, after the First World War, were free from any restrictions on organizing themselves internally as they saw fit. Therefore the proposal † that the Axis states and their satellites be placed under political tutelage may well appear to be unorthodox or even revolutionary.

#### PERSONNEL OF PROVISIONAL GOVERNMENTS

Who are the leaders in the provisional governments? Again the vast comparative material does not offer any definite rules useful as guidance for the future. Predestined for leadership would seem to be persons who, in spite of persecution, fought against the old regime, actively participating in its overthrow. Political power fell naturally to the liberals after the fall of the French Empire in 1870, to the leaders of the opposition parties in Germany, Austria, and the succession states after the collapse of the monarchies in 1918. The great leaders of the provisional governments were men who had suffered persecution under the old regimes: Pilsudski in Poland, Masaryk, Benes, Krmař in Czechoslovakia; Smetona in Lithuania; and, above all, Lenin, Trotsky, and the other heroes of the Bolshevik revolution in

\* See *infra*, pp. 300 ff.

† Elaborated *infra*, pp. 329 ff.

Russia. But this is not invariably the case. After every revolution men are found who, having served the regime of yesterday, are ready to serve those of today and tomorrow. It is not uncommon for men connected with the old regime, and deeply compromised by it, to find their way into the provisional government. The most notorious case is Fouché, the hated Himmeler of the Napoleonic period, the implacable enemy of royalists and republicans, the man of the 18th Brumaire, probably the most cursed man of his time. On the other hand, the radicals and intransigents are not destined to hold power in the provisional government for long. The anatomy of revolutions indicates that the men most likely to succeed as leaders of the provisional government are middle-of-the-road politicians who have not been responsible for the old regime and, on the other hand, cannot be identified with the radical pattern of the future. France in 1871 discarded the unyielding Republican Gambetta and turned in the course of normalization to the moderate conservative Thiers. The provisional governments in the Reich and the *Länder* of Germany in 1918 were controlled by the moderate majority Socialists, who soon elbowed out the radical wing known as Independent Socialists. This does not mean, however, that the political flavor of the provisional government will ultimately prevail. Lenin and Trotsky, by another revolution, overthrew the moderate liberals Kerenski and Milyukov. Military leaders may prove as serviceable as civilians. As a matter of fact, military men are almost indispensable for any provisional government except when foreign occupation relieves the latter from the responsibility to maintain order and tranquillity.

#### EXILES IN THE PROVISIONAL GOVERNMENT

A collateral problem—important wherever a revolution has succeeded, but more important after this war because of the vastly greater number—is the role émigrés and exiles play in provisional governments. One would think that they have a first claim to service in the succeeding regime. There were none in the French provisional governments of 1815 and 1870. It is true

that in 1918 exiles were the given leaders in the succession states which owed their liberation and their recognition as independent states largely to the unceasing efforts of the opposition working abroad. But such parallels are misleading. History need not repeat itself after this war. Generalizations are unfortunate, here as always. But it must not be ignored that after this war liberation comes to peoples who have lived, for varying periods, under a totalitarian regime. This has not been true of any previous revolution. Neither the dictatorship of the two Napoleons nor the rule of the Tsar was totalitarian, harsh as they may have been for the nonconformists. The impact of totalitarian control on mind and body in the liberated peoples cannot fail to affect profoundly the potentiality of exiles, refugees, émigrés, as leaders of provisional governments or even their usefulness in the governments when normalcy has been restored. This statement may be subject to qualifications. The situation is different in different countries, and the intangibles of personalities cannot be brought to a common denominator. But at least for Italy, Germany and, to some extent, also Austria, the usefulness of exiles is limited.

History has shown that there is no worse ruler than the man who returns to power from exile, whether king or politician. Jacob Burckhardt's warning about the returning émigré<sup>2</sup> should not be ignored after this war. The pre-Nazi politicians will have been forgotten by the mass of the German people. The fact that they were defeated and driven into flight and exile, discredited them irreparably, even if the propaganda that lumped them together as the "November criminals" could be neutralized effectively. Such among them as the older generation still remembers, it connects with the "Weimar system" and holds responsible, justly or unjustly, for the plight under the Nazi yoke. Even if the record of Weimar can be cleared in time, the people will curse the memory of the defaulters and bankrupt politicians. The pre-Nazi politicians would be wise on their own account in waiving the claim to leadership. They have lost contact with reality at home, and are strangers in their own land. A people will not trust its destiny to men who have

not shared its hell of suffering and purgatory of deliverance. More likely as leaders in political reconstruction are the unknown soldiers in the resistance movements, the men on whose backs in concentration camps the lash has written the new gospel in blood and tears. Exiles in the security of London or New York, miserable and bitter as their lot may have been, have no title to future leadership. Their democratic faith has not gone through the crucible of the fear of the apocalyptic beast and the danger under its Gestapo. Sieyès, the intellectual leader of the French Constituent Assembly, had disappeared during the Terror; emerging under the directory, he was asked what he had done during the years of oblivion. He answered simply: "J'ai-vécu." The pre-Nazi politicians should be glad to have survived to see the day when their people are free again. This may be hard on many of them, respectable men of personal integrity. But their return to power would be a disservice to their people. This does not mean that their experience in democratic life abroad cannot be utilized at the proper place and time.\*<sup>3</sup> And, even at the risk of giving offense, it should be added that the objections gain double weight in the case of Jewish leaders planning to return. Anti-Semitism is outlawed officially in liberated Europe; but its poison has deeply penetrated the minds of the masses and will affect them for a very long time to come. The emergence of Jews in leading positions would appear to the contaminated people to prove the "Jewish world conspiracy." Their untimely return would interfere with the later reintegration of the Jews into the European community, whose chances appear to be slight enough now. On this point the Jews should not fool themselves again as they did before, incredulous that the Nazis meant what they said. And the warning is thrice valid for the parasites and profiteers of the revolution, to whom the misery of the German or Austrian people is only the ladder to their own glorification and advancement. Men of no importance, of no standing in their own country, who, by artificially inflating their obscure past, have profited as "martyrs" by the hospitality of the countries of their refuge

\* See *infra*, p. 347.

should not be permitted to foist themselves on their people at home.

The problem of the exiled politicians as potential leaders of political reconstruction is relatively easy to solve. They should be denied passports to return until their presence can serve political stability.

#### SOME REFLECTIONS ON FREE MOVEMENTS

A sociological analysis of the so-called free movements in foreign countries would be of considerable value. For the purposes of this book a few observations must suffice. Their actual influence on the shape of things to come after the Second World War has been relatively small, perhaps because the real center of political gravity has shifted to the resistance movements inside the Nazi living space. Their main function has been to exercise pressure among the foreign-stock minorities abroad, particularly in the Western hemisphere. The situation varies from country to country according to the degree of assimilation of such groups to the national milieu. What has been common to them all is a high degree of disunity, reflecting the conflicts of political and social opinion at home. The cleavage among the German, Austrian, Polish, Hungarian, Slovak, Ukrainian, Croat, Baltic, Albanian, and Greek foreign-stock minorities is notorious. More homogeneous in their political aspirations have been the French, Italian, and Spanish free movements, though even these have not been distinguished by national unity. Some among them have been useful as ramrods of the opposition against unrepresentative governments-in-exile. Many of them, however—too many—have had nothing more than a nuisance value. A goodly number have been the active backing of political leaders ambitious to be restored to power after the liberation. What has been said concerning the refugee politicians holds true in most cases for their free movements.

The services the refugee politicians may be able to render are lessened by the fact that they carry their own dissensions

into the foreign-stock minorities and thereby undermine their allegiance to the nation in which they have settled. Sectional controversies have split these unassimilated citizens to an alarming degree, in South America even more than in the United States. Last but not least, there is some danger that a well organized free movement operating as a pressure group among a foreign-stock minority may, with its economic resources, its press, and its organization, exert a considerable influence on political reconstruction in its homeland. It is certain that the voice of the American people will be listened to with attention in Europe after the war. If articulated by the free movements the voice may be not only polyphonous but dissonant. Dissidents in Europe will not be slow to enlist the financial and moral support of sympathizers abroad. Foreign countries of polynational composition, like the United States, Brazil, and Argentina, are threatened with involvement in European disputes over boundaries, forms of government, federation schemes, and other matters of political reconstruction. The danger is necessarily greater while Europe is giving birth to a new political order. The existing, almost anarchical situation, can even lead to dissensions among the United Nations, if the pressure groups succeed in playing off one government against another. (This happened, to the detriment of international harmony, during the San Francisco Conference when the Polish-American Congress, a pressure group controlled by the London Poles-in-exile, forced the issue of the Polish leaders arrested by the Soviets on Secretary of State Stettinius.)

The free movements should have been placed under administrative control in conformity with the law of the land, without impinging on the freedom of speech and organization.<sup>4</sup> Even more urgently needed is a concerted policy among the United Nations on treatment of foreign pressure groups in order to obviate any disturbing influence on peace settlements and plans for political reconstruction.<sup>5</sup> The only country which to date has used free movements as pawns on the international chessboard—and very much to its own advantage—is Russia.



## PROVISIONAL GOVERNMENTS AFTER THE FALL OF DICTATORSHIPS

The provisional governments after the fall of the First and Second French empires serve to illustrate the sequence between an authoritarian and a constitutional (monarchical or democratic) regime, although neither superseded government was totalitarian in the modern sense of the term, so that the value of the parallels may be somewhat lessened.

(a) *The Fall of the First French Empire*

The First Empire <sup>6</sup> collapsed in two stages: after Napoleon's defeat in the battle of Leipzig and the campaign of France, and after Waterloo. And the first restoration of Louis XVIII in 1814 is separated from the second by the Hundred Days between Napoleon's return from Elba and Waterloo (June 18, 1815). Consequently, three different regimes are interlaced.

Talleyrand, while still grand chamberlain of the Empire and vice president of the Senate, negotiated with Alexander of Russia for the restoration of the Bourbons over the competition of Bernadotte. He induced the Senate to declare the forfeiture of the throne by Napoleon in the ignominious session of April 3, 1814 (an act later duplicated by the removal of Mussolini by the Fascist Grand Council); and that faithless body added insult to injury by stigmatizing Napoleon as a man "qui ne même pas est Français." The *Corps Législatif*, suspended by Napoleon since December 31, 1813, miserably and unconstitutionally concurred. After Napoleon's abdication (April 11, 1814) the Allies declared that they had made war against him and not against the French people, and left the choice of form of government to France, provided that Napoleon was excluded. They invited the Senate, mainly composed of Napoleon's protégés, to designate a provisional government. For this function Talleyrand and four of his tools were named, all favoring the restoration. As early as April 5 a committee of the Senate began to work on a constitution, which boldly tried to square the circle by establishing popular sovereignty with the Bourbon king as royal delegate of the nation. But it came to naught. On April 14 the

Senate conferred upon the Count of Artois the title of lieutenant general of the realm under letters patent of the king. Contemporaries will remember that the same dignity was accorded to the Italian crown prince after King Victor Emmanuel's abdication. The Count of Artois's intermediary regime was the second provisional government, a replica of the ancient regime with antirepublicans and ardent monarchists in full control. On May 3 Louis XVIII entered Paris in state, surrounded by the ghosts of the emigration and acclaimed only by the foreign troops which paraded before him. The army and the people remained hostile to the foreign-imposed dynasty and its regime. Talleyrand dominated the new government formed by the king. On June 14, the *Chartre Constitutionnelle* was promulgated by the crown. An emanation of the divine right of the king, the Charter did not require ratification by any other constitutional organs, let alone the constituent power of the people which the Revolution had enshrined. Under its provisions the Chambers of Deputies and of Peers were convened. The Chamber of Peers had among its 154 members no fewer than 84 former Imperial senators, rewarded for treason, and 70 new men, but no former liberals or revolutionaries. The Chamber of Deputies, in spite of the utterly restricted franchise, was hostile to the new regime from the start.

The conduct of government during the first restoration was strictly authoritarian with few or no traces of the parliamentary promises of the Charter. The cabinet, although composed mainly of ultraroyalists and legitimists, lacked homogeneity. In it Talleyrand continued to be the commanding figure. The legislative assemblies sat only from June 4 to December 30, 1814; their work was undistinguished. Even if their powers had been more substantial, the drying up of independent political life during more than fourteen years of Napoleon's dictatorship prevented the emergence of effective political leadership. On the whole the first restoration maintained the existing Napoleonic legislation.<sup>7</sup> The hybrid constitution, operated by a heterogeneous personnel, could not accomplish the tasks of political reconstruction. The regime, disliked by the people and the

bourgeoisie, was an anachronism in a nation which had gone through the equalitarian experience of the revolution and the Empire.

*The Government of the Hundred Days*

No wonder that the first restoration fell like a house of cards before the triumphant Caesar reconquering his land without firing a shot. But the most difficult hour of any revolution comes after it has succeeded. The Bonapartist restoration was built as much on sand as the Bourbon.<sup>8</sup> Upon his return to Paris (March 20, 1815) Napoleon had little in common with the man of the 18th Brumaire except the name. A restoration of his authoritarian regime was ruled out because the country had been treated in the meantime to the promises of parliamentary government under the Charter, defective as their fulfillment may have been. It is to his credit that he made no compromise with the Bourbonic plague. His first government was one of Imperial antecedents without qualifications.<sup>9</sup> From the start Napoleon's position was precarious, not because adhesion of the French people was lacking but because the implacably hostile Allies, prodded by Talleyrand, declared him *hors de loi*. This meant war, again war. Internally the regime did what all dictatorships in peril do. It liberated itself with the "Acte additionnel aux Constitutions de l'Empire" of April 22, 1815—easily one of the most interesting constitutional documents of all times.<sup>10</sup> Since there were no legislative bodies which could cooperate, and time was short, Napoleon called on Benjamin Constant, his lifelong enemy (who before his entry into Paris had fulminated against him as an Attila and a Genghis Khan), to elaborate it. Designation of Constant as father of the new constitution was as sensational as a similar designation by Mussolini of Benedetto Croce would have been. A quaint mixture of the intellectualism of the advanced bourgeoisie and the "destiny" government of the past authoritarian period—particularly in the artificial link with the previous Imperial constitution and the indecision in the adoption of the parliamentary system—the Additional Act was as much an im-

posed constitution as the Charter of the year before. On the whole, it was well received (Lafayette, Madame de Staël, Sismondi approved of it), though without an understanding of its portents for the future. The legislative bodies it provided for were immediately convened, and on May 26, 1815, the constitution was even confirmed by a plebiscite, the regime once more bowing outwardly to the principle of popular sovereignty.<sup>11</sup> The Chamber of 629 members was a cross-section of Imperial merit with some new talent and, on the whole, was a respectable group at a time when there were no political parties and the lifeblood of the nation was sluggish. Any regime succeeding a prolonged dictatorship requires time for training political talent, and a healthy public opinion cannot be re-created at once.

In the meantime Europe had declared war on France. The Chamber assembled on June 3, 1815. Distrusting Napoleon, it raised at once such conflicts around the presidency and the oath of allegiance that Napoleon was inclined to dissolve it forthwith. But the sands were running out fast: it was less than a fortnight before Waterloo. After the organization of a Council of Government under Joseph Bonaparte, composed of the ministers and his brothers, he departed on June 13 for the front. The "fifth column," profiting by the liberal press law (March 25, 1815), flooded the country with attacks on the Emperor while his fate and that of the world was decided on the battlefield. On his return to Paris after Waterloo, on June 21, an aged and broken man, he was powerless to control the situation. As in 1848 and 1871, it was the legislative assembly which overrode all constitutional competitors. Accepting Napoleon's abdication (June 22), it appointed a provisional government of five members, three from the Chamber of Deputies, two from the Peers: Fouché, the mole, was named president by a vote of three to two, his own vote among the majority (June 24, 1815). He was the hero-villain of the second restoration. Through him the fifth column was officially represented in the government. He negotiated secretly with the Bourbons and wrote to Wellington in order to facilitate their return.

Four alternative forms of government now remained to the

French people: a republic; a regency for the King of Rome; a monarchy under the Duke of Orléans; a monarchy under the Bourbons. The Council of Government decided in favor of the King of Rome; but Fouché introduced the decree of the provisional government with the clause "Au nom du peuple Français," and not "Au nom de Napoléon II."

### *The Second Restoration*

In contrast to the first restoration, which had succeeded the political vacuum of fourteen years of Caesarism, the second restoration found the governmental machinery of the Hundred Days in operation, which had been constituted with more than a semblance of legality. The assemblies have been accused of incompetence and weakness, although they showed a remarkable capacity for action in establishing promptly the provisional government. But what could they have done, in their brief period of life (June 22 to July 7, 1815), with the victorious armies on French soil, the political and military master-mind in flight, the nation in turmoil? Yet the chambers were aware that they must frame at once a constitution into which the future sovereign could be fitted, instead of waiting for his constitution to be imposed upon the country. A committee of nine members of the Chamber of Deputies, appointed on June 23, 1815, submitted a hastily prepared project (June 29) which was based on the principle that the nation is the repository of political power and the sovereign is chosen by, and subordinated to, the nation. A monarch not bound by a constitution, said the declaration of July 3, is merely the representative of his party.<sup>12</sup> The debates on the constitution proceeded rapidly until, on July 8, the deputies found the Palais Bourbon occupied by royalist troops who refused them admission, in the classical way of force dealing with reason. On the preceding day the provisional government had resigned. The Allied commander-in-chief Wellington, who understood little of French internal problems, had brusquely demanded the restoration of the Bourbons.

Once more France was plunged into a constitutional

vacuum. It was filled by the man of the hour, Talleyrand. He was France abroad and in exile, the man who had successfully striven at the Congress of Vienna to preserve to France her rank as a great European power. He had a program of action and the will to put it into operation. His plans were executed by Wellington. The French people had no self-determination; the form of government was forced upon it by foreign powers whose acts were controlled by a small group of men.<sup>13</sup>

On July 8, 1815, "Monsieur," once more in the baggage van of the Allied armies, entered Paris. For him no constitutional lacuna existed; the Charter of 1814 had never ceased to exist; it had only been superseded by the usurper. Consequently, it was at once resurrected in its entirety, the only French constitution so revived. Even a cabinet, led by Talleyrand, was available in the persons of the men chosen before his flight three months before. But Fouché had to be added because of his indispensable skill in handling the police and public order.<sup>14</sup> The first ministry of the restoration was that of Talleyrand and Fouché (July 9 to September 26, 1815).

Constitutional legality had been achieved; but it was not the democratic legitimacy which the French people would have elected. They desired a constitutional monarchy, based on the sovereignty of the people and limiting the powers of the crown, in accordance with the imperishable heritage of the Revolution. What they received was an anachronistic version of the ancient regime, adorned with promises of liberal institutions. The history of the second restoration is of no interest here except for the lessons it possibly offers for the political reconstruction after the Second World War. It is the triumph of ferocious reaction which has bequeathed the White Terror to subsequent periods of persecution.<sup>15</sup> It is the record of the vindictive spirit of the émigrés returned to power. Talleyrand and Fouché, the manipulators of the restoration, were among its first victims. The king ignored the Napoleonic bodies as illegal. The chamber elected during the Hundred Days was forcibly dissolved (August 8, 1815). He could not fall back on his own chamber, elected in 1814, because it contained too

many relics of the Imperial period; it was dissolved by ordinance (July 13, 1815). A new electoral law established an exceedingly limited and undemocratic franchise, and under this a new chamber was elected on August 14 and 22, 1815,<sup>16</sup> with an intransigent, ultraroyalist majority, the famous *chambre introuvable*. Ironically enough Fouché was forced out of office (September 10) by the application of the parliamentary principle of the Charter, which demanded the confidence of the chamber for the ministry. Talleyrand, abandoned by the ungrateful King, resigned September 24, 1815.

The history of the second restoration illustrates the predicament of any country after the fall of a dictatorship. The regime lacked political stability, it could not integrate the nation. The balance sheet of a period of fifteen years shows seven different electoral laws, six dissolutions of the parliament, in addition to two prorogations amounting to suspension; eight entirely different ministries, with incessant reshuffling of personnel during the lifetime of each. Internal unrest was chronic. The famous four ordinances of the ministry of Polignac in July, 1830, were the fitting climax of a constitutional experiment doomed to failure from the start. The answer of the French people to dynastic legitimism was the July Revolution of 1830 and the establishment of democratic legitimacy for the constitutional monarchy.

A few general conclusions may seem to be indicated: After a dictatorship the return to normalcy in constitutional procedures is beset with enormous difficulties; even under most favorable conditions it takes a long time. The new order cannot dispense altogether with the men who served the old. A complete break with the past seems to be impossible. A regime succeeding a dictatorial order is hardly in a position to discontinue all restraints on civil liberties. And, finally, a nation which once has lived, even for a short time, under democratic legitimacy, will not be satisfied with any authoritarian substitutes for self-determination.

(b) *The Provisional Government After the Fall of the Second French Empire*

Defeat in the battle of Sedan, September 2, 1870, confronted France for the second time in her history with the collapse of a dictatorial regime. The Imperial constitution of July 17, 1856,<sup>17</sup> did not provide for a regency in the case of the emperor's becoming a prisoner of war,<sup>18</sup> and Empress Eugénie tried vainly to bring about a provisional government, with herself at its head, by a constitutional amendment through the *Corps Législatif*. On September 3 the Government of National Defense was established in the Hôtel de Ville of Paris. Wholly extraconstitutional and revolutionary, it consisted of the eleven deputies of Paris under the chairmanship of the military governor of Paris, General Trochu.<sup>19</sup> The government was homogeneous in that it was exclusively republican; Thiers, the most important man in France, disassociated himself from it from the start. Its leaders were trained in the opposition against the Empire; some of them had been members of the legislative body, but the group as a whole lacked experience in government. With the exception of Gambetta, Jules Ferry, and Rochefort, they were mainly older men; some of them had been victims of Napoleon. Gambetta, the youngest member, with the portfolio of the Interior, was its soul. The assumption of power was peaceful and popular. The constituted authorities of the Empire disappeared. But the provisional government did not represent the nation; it embodied the will of the capital only. The national mandate, it knew, could be obtained only through national elections. On September 8 the law of the Second Republic (of March 14, 1849) was invoked, and elections were decreed for October 12, on the basis of democratic suffrage. But France was at war. The Government of National Defense had been created for vigorous prosecution of the war. On October 7, after Paris had been laid under siege, Gambetta left by balloon for Tours to join what was to become a second provisional government, the Delegation of the Government of National Defense. In view of the rapidly



progressing invasion by the enemy the elections were postponed indefinitely. Strongly conscious of its lack of democratic legitimation, the provisional government found at least partial confirmation by a plebiscite held in beleaguered Paris on November 3.<sup>20</sup> But Paris reflected public opinion all over France, which was overwhelmingly republican.

For five months the provisional Government of National Defense, split into two sections in the capital and in Tours (later, Bordeaux), dictatorially governed France at war. It vigorously eliminated the last vestiges of the collapsed Empire.<sup>21</sup> But when the fortunes of war turned definitely against France its main preoccupation became the conclusion of an armistice with Germany's Bismarck. The government which had remained in Paris not only was confronted with the rising revolutionary movement of the left inside that city, but found itself also at loggerheads with the Delegation in Bordeaux which, under Gambetta's influence, wished to continue the war even after the hope of foreign intervention on behalf of France had been disappointed.

On January 23, 1871, Jules Favre left heroically starving Paris for Versailles to negotiate an armistice with Bismarck. On January 26 the conditions were accepted by the Government of National Defense. Bismarck granted an armistice of twenty-one days in order to hold elections for a National Assembly which would decide on the continuation of the war and eventually on the conditions under which peace would be concluded.<sup>22</sup> Bismarck was a realist; he knew well that the Government of National Defense had no legal power to conclude peace. As a legitimist, he considered the Imperial government as the legitimate government of France.<sup>23</sup> But since the by then wholly discredited Government of National Defense had no authority to negotiate peace—and the conditions would be onerous—he insisted that a National Assembly, based on democratic legitimacy, should be convened as the proper agency to decide on war or on peace. He was not interested in the form of government to be adopted after the peace; all

he desired was a representative government with which he could conclude peace.

Gambetta, the *spiritus rector* of the Delegation of Bordeaux, reacted violently against the armistice conditions, and led his colleagues in open revolt against the government in Paris. Although the decision of war and peace was left to the National Assembly, the fact that elections were to be held precluded the continuation of the war *à l'outrance*. The incident which ensued therefrom is important because it implied direct interference by Bismarck in the internal affairs of France—most unusual in view of the dominance, at that time, of the dogma of nonintervention and internal self-determination. Gambetta feared that if many of the antirepublican opposition of the right, monarchists and Bonapartists, were elected, the National Assembly would be in favor of peace. In France it is always the right which, after a lost war, comes to terms with the enemy. Therefore, he decreed from Bordeaux on January 31 the ineligibility of all persons who, from December 2, 1851 (*coup d'état* of Louis Napoleon Bonaparte), to September 4, 1870, had held office as minister, senator, councilor of state, prefect, or who, during this period, had accepted the official candidacy of the Imperial regime. Bismarck, in a vigorous letter to Gambetta over the head of the Government of National Defense, protested against the exclusion, referring to the armistice conditions which had stipulated "free" elections. Gambetta in turn denounced the brazen interference in the internal affairs of France, at that time still an independent state. As the defender of undiluted democracy the Iron Chancellor certainly cuts a strange figure; but he had the letter of the armistice agreement on his side and he did not wish to jeopardize the chances of a *Siegfrieden* by an assembly with a republican and war-minded majority from which the leaders of the opposition of the right, eager for peace, had been purged. Yielding to Bismarck, the government in Paris canceled the Bordeaux decree February 4, 1871. Gambetta resigned.

The rest of the story of the provisional government—or

the two provisional governments—is easily told. The end came swiftly and logically. Elections were held on February 8, with no interference by the occupation authorities. Democratic legitimacy was restored. Full powers passed automatically to the National Assembly, meeting first on February 12. On the next day Jules Favre brought from Paris the resignation of the Government of National Defense. Gambetta, having been elected only in nine constituencies, compared to the twenty-six of the conservative elder statesman Thiers, had lost the game. On February 17, the Assembly elected Adolphe Thiers Chief of the Executive Power of the French Republic. He and the National Assembly ratified the conditions of peace on March 1, and they were embodied in the treaty of Frankfort (May 10, 1871). The treaty was accepted by a vote of 546 to 107. Among the opponents were Gambetta, Louis Blanc and Georges Clemenceau.

There are noteworthy lessons in the fall of the Second French Empire. If possible the armistice after a lost war should be concluded with a civilian authority of the defeated, the moral authority of the military commanders alone not being sufficient. There must be a government, even if it is only provisional, to take the responsibility. But a provisional government should not be charged with concluding the final peace; if its authority is challenged, the peace itself will fail in popular acceptance. The most appropriate solution is election of a national assembly to reject or accept the peace treaty. It would be wise to divorce the question of form of government altogether from the question of the peace. The French National Assembly of 1871 was elected for the sole purpose of deciding on war or peace; it assumed the function of writing a constitution afterwards, without special mandate from the electorate. It is advisable to follow the French precedent at least in the case of Germany, convening an assembly at the proper time for the sole purpose of accepting the peace—to be dissolved thereafter. Only at a later date—much later if the policy of a continued political tutelage over Germany is adopted—a new National Assembly should be elected to elaborate a constitu-

tion. The body which accepts the peace after defeat should not be the one to decide on the form of government. Nor should acceptance of the peace treaty be rushed. The mandates for accepting terms of peace and for writing a new constitution are so different in substance that they should be kept apart, in separate elections. With the peace treaty—which cannot be anything else than a *Diktat*—out of the way, a constitution can be elaborated that will not have the handicap of being associated with the treaty of peace.

#### DE GAULLE'S PROVISIONAL GOVERNMENT OF FRANCE

Among the provisional governments in formation in the various countries at the end of the European war, by far the most important, and the most interesting in constitutional theory and political practice, is the French provisional government of General Charles de Gaulle. In spite of initial misgivings in some quarters abroad concerning De Gaulle's personal qualifications as political and civilian leader, his aims and methods, students of history have been little surprised at the successful establishment by the original French Committee of National Liberation<sup>24</sup> of its claim since June 2, 1944, to be the provisional government of France. Nobody could withhold admiration from the forceful leader who, in France's hour of deepest humiliation, took the lonely place in exile on the side of the United Nations which it was the historical duty of the constituted government of the Third Republic to take. His ascent to power need not be narrated here in detail. At first the French National Committee he formed was mainly an organization for military purposes. With the liberation of French territories successively in Syria and Lebanon, Madagascar, Algeria, and other parts of Africa, it took over their civilian administration; and its contingents fought valiantly side by side with the Allied armies. Immediately upon the invasion of Normandy the Allies, abandoning the original plan of placing the liberated parts of France under an Allied military government, turned over the local administration to De Gaulle's men and the Resistance; and

the liberation of Paris by General Patton's forces (August 25, 1944) permitted the establishment of De Gaulle and his government in the capital in September, 1944. The fitting climax was reached when the great powers finally recognized De Gaulle as head of the provisional government of the French Republic on October 23.

Long before this official recognition was granted, the government of De Gaulle had demanded recognition and readmission as one of the great powers. In the Dumbarton Oaks proposals for an international security organization France is accorded, "in due course," a permanent seat on the Security Council, ranking equally with the Big Four—the United States, Great Britain, Soviet Russia, and China. Such a claim was self-evident for a nation and a government as self-assertive as the French, who seem to forget that their liberation was accomplished by the Allied armies and not by the *maquis* around whom a typically French legend of self-glorification is growing under the eyes of a bewildered world. But the claim is based more on traditional and historical grounds than on the present or future power potentialities of a nation with hardly forty million people, whose lifeblood has been sapped by the satanic Nazi device of keeping almost two million of its men as prisoners of war since the armistice. Be that as it may, the Anglo-Saxon powers realize that in the postwar configuration of Europe there must be a state of bourgeois structure as a counterweight against Russia, and that, with the uncertainties of the German future, France of all European nations is cast for that role.

Recognition and rank notwithstanding, the De Gaulle regime is merely provisional. De Gaulle himself has readily admitted this fact. Like any other provisional government, it lacks a democratic legitimacy which is rationally measurable. The French people had no alternative except chaos and disintegration under local juntas of the Resistance. It came to power as the only regime available for civilian administration. However, like all provisional governments, it must ultimately be legitimated by the French people through a democratically

elected national assembly. Its present structure is necessarily authoritarian, and its methods of government are undeniably authoritarian. A frank admission of this fact would be preferable to the propagandistic claim that it is intrinsically democratic.

Within the De Gaulle regime one has to distinguish between the provisional government proper, transformed from the French Committee of National Liberation, and the Provisional Consultative Assembly, created by the committee on September 17, 1943.<sup>25</sup> The latter, at first consisting of 102 members,<sup>26</sup> was expanded by decree of October 11, 1944, to 248. Of these, 148 are delegates of the metropolitan Resistance, and 28 of the colonial; and 17 of the group are simultaneously members of the National Council of Resistance—which, while not officially represented in the cabinet, can exercise considerable influence over the Assembly. France overseas is represented by an additional 12 members; and 60 members belonged to the parliament which was superseded in 1940 by the Pétain regime. Naturally these were among the 80 who voted at that time against the transfer of full powers to the Vichy government. It may seem strange that some among the 80 courageous patriots failed to be admitted; and all the men who sailed on the *Massilia* for Algiers to set up the government-in-exile would seem to have the right to seats in the Consultative Assembly—they certainly would have voted against Pétain. However, perhaps less De Gaulle than the Resistance objected to so large a proportion of old parliamentarians in the Consultative Assembly in spite of the fact that their political experience would have contributed to its efficiency. Consequently, the parliamentary section seems as much underrepresented as the Resistance is overrepresented.

The assembly is of transitory character only. It will be dissolved automatically "as soon as an assembly can be formed to appoint a provisional government" (Section 1 of the Algiers decree of September 17, 1943).<sup>27</sup> At the same time the assembly is purely consultative: the only matters which the government must submit to it are the budget and loans (Section

18). The provision (Section 21) that, on the initiative of two-thirds of the members, the assembly may place on the agenda "any matter of national interest" does not increase its powers greatly; the government, however, may accept its advice. Its standing orders<sup>28</sup> contain some useful innovations: limitation of the budgetary powers, substitution of "questions" on the British model for the notoriously disastrous practice of interpellations—old desiderata of French constitutional reform which may be finally incorporated into the constitution of the Fourth Republic. In Algiers the assembly sat only one week every two months (Section 11); as the regular provisional consultative assembly now constituted in Paris, it met four times a year in sessions of one month each. The re-formed assembly convened for the first time November 7, 1944, in the Palais du Luxembourg where the Senate formerly had met; and Félix Goupin, its president in Algiers, was elected the first president.

Provided that the aftermath of the war does not bring a revolutionary competitor to De Gaulle's provisional government, the political reconstruction of France will follow a blueprint issued by the Committee of National Liberation after deliberation with the provisional consultative assembly, in an ordinance of April 24, 1944.<sup>29</sup> Roughly, the plan is as follows: A Constituent Assembly will be elected within one year after the total liberation of the country, by all qualified French men and women by direct, secret ballot (Article 1). The motto of the transitional period was to proceed gradually, by reestablishing first the municipal councils elected prior to September 1, 1939 (Articles 3-9), and thereafter the *conseils généraux* (Articles 10-14) and the general council for the Seine Department (Article 15). Regular elections to the provisional general councils (municipal, cantonal, departmental) are to be held upon completion of the electoral lists—a task which is made considerable by the number of returning prisoners of war and deportees. Of particular importance are the departmental committees of liberation, which receive official status and special privileges, intended to assist the prefects

(Article 19). Elections to the municipal councils were held on April 29 and May 13, 1945.

While these arrangements were, on the whole, unobjectionable because they integrated the Resistance into political reconstruction, the position of the provisional government toward the consultative assembly and public opinion at large seems less palatable to democratic orthodoxy. One may disregard now the clever machinery by which the elections for the provisional consultative assembly would have been staggered, since it was not expected that the liberation of France would be accomplished at a stroke; but from the published reports it appears that De Gaulle brooks no interference from the consultative assembly in the selection of his collaborators. He is beyond parliamentary control in the same way as an American president. Moreover, he will remain in undisputed and irrevocable authoritarian control until the provisional consultative assembly has transformed itself, after the elections, into the provisional representative assembly (Article 23). To it the provisional government will have to hand over its powers. Thereafter, the new assembly will elect, by absolute majority, the president of the provisional government (Article 25). So far, so good. But the vote of confidence "will give the provisional government, until the Constituent Assembly is convened, the *pleins pouvoirs* granted to Daladier on December 8, 1939"; and this vast delegation of powers is irrevocable until the constituent assembly has been convened (Article 27). Moreover, even the elected provisional representative assembly has merely consultative functions. It is likewise stripped of genuine legislative powers and has hardly more effective control than the present provisional consultative assembly with its haphazard recruitment from the Resistance. This design has a decidedly unpleasant authoritarian flavor.

To review here the steps France has taken on the road to political reconstruction, or to pass judgment on De Gaulle's record as political leader, is beyond the compass of this discussion. But if the transition scheme is tailored to measure for General de Gaulle, the French people might remember



that theirs is a traditional aversion against generals in civilian control; and there is hardly a more ungrateful people than the French. If Marianne wishes to regain her lost prestige in Europe and the world, she will do well to set up—even as early as the transition period—a constitutional order which, while providing for a strong executive, will avoid any suggestion of the strong man's government.

#### SOME GENERAL CONCLUSIONS ON PROVISIONAL GOVERNMENTS

The vast comparative experience with provisional governments—of which only a few illustrations have been given here—allows some general conclusions. By its very origin the provisional government lacks legitimacy. It has no mandate to govern, except its belief in its own mission and the imperative need of any political order for a supreme directive authority. Therefore, by nature and by circumstance, it is authoritarian. An emergency government *par excellence*, it must have the power—and rarely can resist the temptation—to restrict individual liberties and democratic rights, if for no other reason than to maintain itself in power. Only wise self-restraint in the men at its head will keep a provisional government from becoming dictatorial: which is enough to make military men congenitally unsuited for its functions. A provisional government has to defend itself against the regrouping forces of the old regime as well as against competitors and rivals, who have the understandable impulse to set the pace and goal of political reconstruction according to their own ideals. Thus the provisional government will grow conservative and even find it necessary to put down the aspirations of more radical groups, by armed force. The Government of National Defense in France in 1871 was in constant fear of the Socialist revolution, which subsequently the National Assembly had to subdue with its army. The provisional government of the Reich in 1918–1919 fought against the Spartakus uprisings. The danger of Communist competition will be much greater after this war than it was in 1918, when Bolshevism was still untried. From the start all provisional governments established after the lib-

eration have had to contend with the pressure of the Communist-controlled Resistance.

Because of the provisional government's lack of legitimacy and its authoritarian character, it should be of the shortest possible duration, and it must be terminated by the establishment of the legitimate authority. This can be accomplished only by elections for the national assembly. To provide for them and assure the orderly convening of the assembly is the primary task of the provisional government. Thereafter it must surrender its power to the nation represented in the national assembly; and until then it should consider itself merely as the trustee of the people, the receiver in bankruptcy of the old regime, preparing for democratic rehabilitation. This imposes definite limitations on its conduct. It should refrain from irreparable acts or irrevocable solutions that anticipate the future. This may seem impossible because the provisional government, like other governments, has to govern. It must purge the administration of supporters of the old regime, and its natural tendency is to replace them with its own men; but in doing so it runs the risk of working to perpetuate itself, or to influence the national assembly in its choice of legal government. The supervision of elections by administrative officers under the control of the provisional government is as dangerous as it is inevitable. The chances of political reconstruction would be immensely enhanced if certain countries whose political equilibrium is precarious could be persuaded to accept international policing of their elections. This could well be the meaning of the "assistance" promised to the liberated peoples and the Axis satellites by the Crimea agreement, which obligated the "Big Three" to "facilitate where necessary the holding of such elections." But the liberated nations insist on complete internal self-determination and would not permit such tutelage.

The task of the provisional government is delicate and, in the circumstances, decisive for the shape of things to come. Paradoxically, the best qualified leaders for the difficult *ad interim* period are men who have no aspirations to future lead-

ership. They should be satisfied to fill a gap, and nothing more. The real leaders of a nation should hold themselves back for the time when they can act with the strength of democratic legitimacy. But this is probably asking too much of human nature.

## CHAPTER III

### *The National Assembly*

#### DEMOCRATIC LEGITIMACY AND THE NATIONAL ASSEMBLY

Ever since the memorable June 27, 1789, when the nobility and the clergy of France joined the Third Estate as National Assembly, Rousseau's bold fiction of popular sovereignty has been the living reality of the modern state. The name National Assembly had been voted on June 17 by the Third Estate on proposal of Abbé Sieyès, celebrated author of the world-shaking pamphlet "Q'est-ce que le Tiers?" A national assembly, representing the nation, exercises by right the constituent power, the supreme attribution of internal self-determination. Democratic legitimacy knows no higher authority than the people themselves to choose the form of government they wish to live under. A national assembly incarnates and executes the constituent power of the nation. It is true that Rousseau, after his experience in Geneva, had an uncompromising hostility against what he deemed the perversion of the popular will by representative institutions, which would have extended to the very concept of a national assembly. But the French National Assembly, which is still unsurpassed in profundity of political thinking, preferred the representative method to the plebiscitary for the supreme decision on the national existence. Thereafter the plebiscite as a way of choosing the form of government took a subordinate place in the state practice, surviving as the constitutional referendum in certain democratic environments and revived in the distorted form of the dictatorial plebiscite.\*

\* On use of the plebiscite to determine the form of government, see *infra*, pp. 282 ff.

See pp. 464-478 for footnotes to this chapter.

## THE CONVENTION IN ENGLAND AND AMERICA

The idea of a special assembly acting on behalf of the people when they cannot be assembled technically in one place for deliberation, is not French in origin. It is rooted in the religious concepts and practices of English and Scottish Protestantism. Undergoing a transubstantiation from the spiritual into the secular in the postulates of the Levelers and Independents of the Puritan revolution, and merging with the age-old concept of the social contract, the practice of the convention was first applied in the transition from the dictatorial regime of Cromwell to the legitimacy of the Stuarts in 1660, and was deliberately repeated in 1689 when the Glorious Revolution necessitated a change of dynasty.<sup>1</sup> The French "convention" of 1792 used these precedents for its own legitimation.

In American practice "convention" denotes an assembly which, though as a rule extraconstitutional, derives its legitimacy from the people themselves—or, as it has been expressed judicially, "the people themselves assembled by their delegates to whom the care of the Commonwealth was especially as well unboundedly confided."<sup>2</sup> The constitutional convention for elaborating the "fundamental order" over which alone the community of citizens could legally dispose, became the feature of government peculiar to America during and after the period of independence.<sup>3</sup> Aside from its ideological qualifications, it provided a convenient method for activating democratic principles without the inconvenience of large popular gatherings. Of the twelve constitutions drawn up by 1778, no fewer than nine were drafted by special conventions.<sup>4</sup> The conventions' decisions were subject to popular ratification, a practice which, however, developed slower. Steps indicating it were taken in Maryland, Pennsylvania, and the two Carolinas. The constitution of Massachusetts was the first to be formally accepted by the voters. At first either committees of safety<sup>5</sup> or the previously constituted legislative assemblies acted as provisional governments. And the wholly revolutionary

situation was "normalized" by the "doctrine of acquiescence." <sup>6</sup>

The experience was duplicated on the federal level. It is interesting to note that both the First and the Second Continental Congress were plainly extraconstitutional and had no popular authorization to write a constitution or to declare the independence except by the natural right of revolution against tyranny.<sup>7</sup> The singular aspect was that the Continental Congress was simultaneously *in loco* of a national assembly and the provisional government because until 1789 no other central executive organ was established. The provisional government of the Second Continental Congress lasted as late as March 1, 1781, when Maryland ratified the Articles of Confederation. Even after they had gone into force, the functions of central government—or what little of such government state jealousy permitted—was exercised by the Congress itself and such agents as the executive business required.<sup>8</sup>

#### THE CONSTITUTIONAL CONVENTION OF PHILADELPHIA

Nor was the Philadelphia Convention in any way predicated on democratic legitimacy. It was not even a convention in the technical sense, but merely an advisory body to the Congress, of a semiofficial character, or a private gathering of notables. It did not have the semblance of a popular mandate.<sup>9</sup> The Constitutional Convention opened on May 25, 1787. In spite of its lack of official authorization it was the ideal instrument for designing a new constitution, because it was not encumbered by any other preoccupation as were most subsequent national assemblies. The final draft was read and signed on September 17, 1787—a record in speed and quality of product hardly equaled by any other convention or national assembly.<sup>10</sup> A most remarkable feature was that the proceedings were shrouded in complete secrecy.<sup>11</sup> The public discussion preceding ratification had to take the document at its face value—another absolutely unique aspect of constitution-making anywhere. The people who had to decide on acceptance (if it is permissible to speak of the "people" in view of the

exceedingly undemocratic suffrage)<sup>12</sup> could not rely on the intentions of the framers of the Constitution, except through partisan propaganda of which *The Federalist* is the most distinguished specimen. Grave deficiencies were discovered by the state conventions and by public discussion. The bill of rights in the first ten amendments had to be added as early as 1790—another singularity since no other constitution had to be basically amended immediately upon its enactment. But the series of anomalies does not end here. The Philadelphia convention now enlisted the Continental Congress to legalize its work. It requested the Congress to transmit a copy to each state legislature with the proviso that a convention be called by the state for acceptance or rejection. Not only that the Constitution went into effect, by its own terms, upon acceptance by the ninth state instead of by all thirteen states as the Articles of Confederation had done; in addition, the Constitution imposed upon the states the method of ratification. But the states went along. The ninth state to ratify was New Hampshire (June 21, 1788).

By no stretch of imagination can the Constitution of the United States be said to owe its origin to the people of the United States. It is not derived from a democratic mandate, not hallowed by democratic legitimacy. The principle of aristocratic remoteness of delegates who were not representatives, was driven to the limit. Only the method of ratification by special conventions gave it a popular stamp. A similar procedure—beset by extralegal anomalies, to phrase it mildly—can be recommended for political reconstruction after this war only if a similarly gifted private body of experts and patriots is found which will vouch for a product of like eminence and durability.

The subsequent role of the convention in American government need not be elaborated here. It is designated in the federal Constitution (Article V) as a means of amendment, but has not been much used.<sup>13</sup> On the other hand, the constitutional convention is the customary method, unchallenged in its usefulness, of framing new state constitutions. Since 1789

some one hundred and thirty conventions have been called which have framed as many new state constitutions.

#### THE FUNCTIONS OF THE NATIONAL ASSEMBLY

Let us return now to the European application of the convention in the form of the National or Constituent Assembly. Its functions may be summarized thus: (1) It is the only legitimate authority in the period between two systems of political legitimacy. As such, it may itself exercise the government functions; or it may designate by election a government distinct from the assembly. Though legal this government remains provisional until the new constitution enters into effect; thus it may be styled the legal provisional government. (2) The National Assembly enacts a temporary, provisional constitution. (3) It elaborates and adopts the permanent constitution. (4) It conducts the normal legislative business, as a temporary parliament. (5) It may, or may not, continue as the regular parliament after the enactment of the constitution.

Before these various activities of the National Assembly are discussed, its function may be illustrated with a few case histories that have potential value for political reconstruction after World War II. It is essential to note that the duration of a National Assembly and the quality of its work—which, in turn, may determine the stability and usefulness of the constitution—largely depend on whether the people can agree on the fundamentals of the new political order, or whether these very fundamentals are controversial. A most telling illustration of the second type is the National Assembly of France after the fall of the Second Empire.

#### THE FRENCH NATIONAL ASSEMBLY (1871–1875)

Our earlier narrative arrived at the point \* where the National Assembly, convening in Bordeaux, accepted the resignation of the provisional Government of National Defense and elected Adolphe Thiers Chief of the Executive Power. Although it is the Constituent Assembly with the longest life on record

\* See *supra*, pp. 243 ff.



(February 8, 1871, to March 8, 1876), it failed dismally in its main task of writing a new constitution.<sup>14</sup>

(a) *Elections*

The elections were held under abnormal conditions, with large sections of the country occupied by the enemy. The date (February 8) being stipulated in the armistice, they were so precipitated that public opinion had no time to crystallize. Elections and plebiscites had been fairly frequent under the Empire, so that the voters knew the procedure though not the complicated and defective electoral law of March 14, 1848, which required technically much more preparation than the system used under the Empire. Masses of voters were absent from home—as many as 400,000, prisoners of war. The common man was stunned by the crash of the Empire, the defeat, the desertion by friends abroad. There were absolutely no political parties. The dictatorship had stifled political thinking; the masses were without leaders; information by a reliable press, knowledge of platform and candidates, sound preparation. They were even ignorant of the purpose of the assembly, whether to accept the peace alone, or also to frame a new constitution of whose content they had not the remotest idea. But the issue of continuing the war or submitting to the dictated peace was the only determinant in the election of representatives. So disorientated was public opinion that it differed from one territorial division to another. Never had an election been held under less favorable conditions. It was performed without any interference by the occupation authorities or the government. The number of abstentions seems to have been considerable.

(b) *Composition of the National Assembly*

Members of the National Assembly should have numbered 768—too many for effective parliamentary work; with multiple nominations of a candidate in more than one district, only 630 were elected. The results of the poll were about 400 conservative members (Orleanists, legitimists, and a handful of Bonapartists);<sup>15</sup> about 200 republican members, roughly

grouped into moderates and radicals,<sup>16</sup> but split into various groups, from the opportunists of the "wait-and-see" to the genuine or "radical" republicans like Gambetta, Ledru-Rollin, Edgar Quinet, and the *Montagne*, which, decimated by the Commune, soon disappeared. About 200 members of the old nobility were elected, and three high church dignitaries, among them an archbishop. No exiles were chosen. The liberal policy of the Empire had left practically none of importance except the implacable thunderer Victor Hugo, who played no political role after 1870. The monarchists were the most surprised at their unexpected success, which may be ascribed largely to two motivations. The people yearned for peace after the lost war. There was no desire for revenge. They looked backward instead of forward, and the monarchists were not encumbered with the national disaster, a psychological experience which may not be confined to a particular country or time.

The composition of the assembly did not reflect the will of the people which were far more inclined toward republicanism. The voters turned to those who promised peace, and, in addition, to candidates with nonpolitical qualities, age, wealth, respectability, local prominence. Parliamentary leaders stemming from the predictatorial period were few, but the opposition in the Napoleonic legislatures had at least acquired some political experience. The group as a whole was without orientation and organization, not knowing each other and untouched by the *esprit de corps* which, prior to totalitarian rudeness, united even the opposing factions of a parliamentary body.

### (c) *The National Assembly at Work*

During its long years of operation the National Assembly performed all functions incumbent on such an assembly. For the exercise of the executive functions it preferred appointing a separate government committee, on the precedent of 1848, to exercising the functions itself through committees on the pattern of the Convention of 1792. The obvious selection as Chief of the Executive Power was France's "grand old man," Adolphe Thiers (February 17, 1871, to May 24, 1875).<sup>17</sup> States-

Third Republic was founded, by a single vote. Half of what was to be its constitution was completed by the acceptance (435 to 234) of the Law of February 24 on the Senate and (425 to 254) of the Law of February 25 on Public Powers, implemented in the course of 1875 by the remainder of the constitutional acts.<sup>26</sup>

The National Assembly, the longest on record, died slowly. Its last session opened on December 30, 1875, and terminated on March 8, 1876, when the new chambers assembled.

### *The Lessons*

Unimpressive as the final achievement of the National Assembly was, there were extenuating circumstances: It was not elected to frame a constitution. Although it had as much intellectual capacity as any similar group, its members, after the political drought of the dictatorship, lacked political and parliamentary experience. The unsatisfactory compromise between monarchist aspirations and republican concessions reflected the parallelogram of political forces. It is likely that, without the threat of a renewed German attack in 1875 and of the monarchist plot, the constitutional task never would have been completed. A constitution cannot be written until the form of government has been decided on. The cleavage between the masses of the people and an assembly which was sovereign because it could not be dissolved, had become unbridgeable. Had it been dissolved around 1873, and a new assembly been elected for the specific purpose of framing a constitution, the voters would have insisted on a straightforward republican solution. Through the entire duration of the assembly the state of siege was maintained. A great technical disadvantage was the overlapping and duplicating of constitutional plans emanating from the commission, the plenary sessions, and the *coulisse*.

That the emergency structure finally enacted with five constitutional laws could become, in less than a decade, a house strong enough to shelter the Third Republic for sixty-five years—a long time for any constitution—is the accomplish-

ment of the French people themselves and not of the constitution.

#### THE CREATION OF THE BELGIAN STATE (1831)

In contrast to France with its chaotic dissipation of energy in the National Assembly of 1871, the Belgian nation in 1830 was a model in its purposeful and rational establishment of a new state and political order.<sup>27</sup> The union of Belgium (the Austria Netherlands) with the kingdom of the Netherlands, decreed by the Congress of Vienna, broke down under the impact of the French July Revolution of 1830. The Belgians revolted against Dutch rule August 25, and set up a provisional government under Charles Rogier late in September. This on October 4 declared Belgian independence and summoned a national assembly or congress. The elections took place in the midst of military operations but were orderly. The electoral system set up by the provisional government was indirect, about 400,000 voters electing an electoral college of about 30,000 which in turn elected a congress of 200 members with 200 substitutes. This assembly was unusually homogeneous, which may explain the complete agreement on the fundamentals of political existence and the absence of disunity.<sup>28</sup> None were elected who opposed Belgian independence. The assembly was convened on November 10. A hard-working body, it lasted nine months, held 156 sessions, and would sit from eleven o'clock in the morning until late at night.

The foundation of the Belgian state is distinguished by several unusual features. Anticipating the meeting of the assembly, the provisional government appointed in October, by decree, a commission of twelve to prepare a constitution for discussion by the assembly. The assembly wisely confined itself to the fundamentals—namely, the decision on the form of government and the writing of the constitution—and refrained from acting as an ordinary legislature or supervising the provisional government. The assembly accepted the monarchical form of government (November 18), recommended by the

commission,<sup>29</sup> confirmed the provisional government's declaration of independence, and excluded the house of Nassau from the throne. Then an assembly committee of twelve (November 22) set to framing a constitution in accordance with the form of government already accepted. This was the famous Belgian Charter, promulgated on February 7, 1831, the most liberal constitution of the period and the lineal ancestor of a whole family of similarly constructed constitutions in the old world and the new. Under the strict conditions of the Charter, the crown was first offered to the Duc de Nemours, second son of King Louis Philippe; but he declined when Lord Palmerston resisted. A regency was established February 24 under Surlet de Chokier. On June 4 the assembly elected as king Prince Leopold of Saxe-Coburg-Gotha, who accepted. The assembly dealt also with the international status of the new state by accepting the settlement of the Eighteen Articles drawn up by a conference of the powers in London.

The record of the Belgian National Assembly is equaled by that of the constitution it produced; this instrument of government survived the troubled year 1848 and two invasions by an enemy country.

#### NATIONAL ASSEMBLIES AFTER THE FIRST WORLD WAR

##### *The Political Issue*

What happened in 1918 in Germany proper, and in the succession states created on the ruins of the German and the Austro-Hungarian empires, was not a social revolution; in Germany, it was merely a change of the political regime; in the succession states, the establishment of statehood and independence under national regimes by the formerly subjected nationalities. In each case the democratic republic was the obvious and unchallenged solution. Monarchy had lost out—in Germany by the defeat in the war, in the succession states because it was tantamount to foreign domination. Unlike the French Constituent Assembly of 1871, the national assemblies

convened after the First World War contained no admittedly monarchical parties. Universally, political democracy was considered as the sole feasible form of government, contested only by a minority of radical intellectuals who were able in isolated cases, as in the Soviet experiments of Hungary and Bavaria or in Thuringia, to induce a minority of workers to try radical solutions. The Bolshevik alternative was untried, still precarious in the country of its origin, Asiatic in spite of its Westernized ideology, wholly alien to the thinking habits of European peoples. In every single case the bourgeoisie of all flavors and the moderate socialists were able to neutralize such efforts and to pilot the ship of state along the safer course of constitutional democracy. With minor variations, all peoples were anxious to normalize without delay the revolutionary situation, as it existed inevitably under the provisional governments, through democratic elections for national assemblies which at once settled down to constitution making.

Moreover, after the First World War the passions of the people were not such as to espouse radical solutions. The opposition had not been constantly confronted with extermination under the fallen authoritarian empires (except Russia) as it has been under the totalitarian regimes. Temper and mood of the peoples in 1918, with only slight and passing deviations, were optimistic, constructive, confident of their own ability to choose political democracy as form of government and to make it work—the Spenglerian prophecy of impending doom to the contrary notwithstanding. The *Untergang des Abendlandes* was a "high-brow" book; the people did not read it, and the intellectuals tore it to pieces because of its flagrant inaccuracies and distortions. What influence it had on thinking came much later, and one is inclined to believe that Spengler's *fin de siècle* mood appealed more to foreigners than to his countrymen. In retrospect this naïve belief that at long last the springtime of democracy had come may seem a strange delusion; but, for those who lived through the time, it was an exhilarating experience never to be forgotten.

## ELECTIONS FOR THE NATIONAL ASSEMBLIES

In spite of the lost war, the difficulties of demobilization and reconversion, the continued blockade, and the sporadic internal restlessness, the German people regained its mental equilibrium within a surprisingly short time. The first prerequisite to the return to normalcy was the holding of elections for a National Assembly. This task was effectively performed by the provisional governments of the Reich and the *Länder*. New electoral laws,<sup>30</sup> drafted by the government and put in force by ordinances, were based on ultrademocratic principles, granting universal suffrage at the age of twenty, and dedicated—most unfortunately as it turned out—to proportional representation, at that time believed to be the pinnacle of democratic justice, in one or the other of its endless and endlessly complicated variations. All other new states (Austria, Czechoslovakia, Poland, Yugoslavia) likewise introduced proportional representation. So unqualified was the confidence in democratic legitimacy—or so little resentment existed against the old regimes—that the exclusion of certain persons or categories of persons from the franchise or from eligibility because of their identification with the past, was not even thought of.

Elections in Germany were held peaceably and with an unprecedentedly high participation by the vast electorate, many of whom voted for the first time. Except in isolated districts with political disturbances in which the state of siege could not be lifted, individual freedoms were unimpaired. The parties relabeled themselves but, on the whole, retained their parliamentary personnel; party platforms were universally democratic; there was practically no opposition to political democracy; the reaction was frightened and concealed itself under the protective coloration of democratic parties. Election frauds were conspicuous by their absence. The elections were held in the Reich and the *Länder* about the same time, in January and February, 1919. Because Berlin was still a zone of military operations against the Spartakus rebellion,

the National Assembly of the Reich convened in Weimar on February 6. Hardly more than three months after the collapse of the German Empire, the national and state constituent assemblies were in full operation—a record for a people inexperienced in democratic procedures.

CZECHOSLOVAKIA DISPENSES WITH AN ELECTED NATIONAL  
ASSEMBLY

No elections for a national assembly took place in Czechoslovakia.<sup>31</sup> The Czechoslovak state owed its existence not only to the fortunate emergence of great national leaders but to the cooperation of a body on foreign soil with the revolutionary forces inside the country.<sup>32</sup> On October 14, 1918, the National Council notified the Allied powers of the formation of the provisional Czech government (Masaryk, Beneš, Stefanik); and on October 18 it proclaimed the independence of the Czech state. On October 28 political power inside Bohemia and Moravia passed, by a bloodless revolution, to the National Committee in Prague, formed by a union of all Czech parties. It was joined October 30 by delegates from the Slovak National Council, which had emancipated Slovakia from Hungary. A national concentration government was formed in Prague under Krmař as president. The fusion of the two provisional governments took place October 31, after negotiations between Beneš and Krmař in Geneva.

The form of government was to be determined by a national assembly. Elections could not be held, because certain territories were in dispute between the new state and Austria and Poland. Therefore, in an irregular way the existing National Committee was enlarged so that it would represent all the Czech parties which had been instrumental in liberation from inside. The seven Czech parties that had been represented in the Austrian Reichsrat coöpted new members to the National Committee, according to a key based on the strength of the parties as evidenced by the elections of 1911. The National Committee thus expanded its membership to 256.<sup>33</sup> It then transformed itself, on November 9, 1918, into the



National Assembly and replaced the provisional government in Paris on November 13 by the new government with Masaryk as president, Krmař as prime minister and Beneš as foreign minister. The new state did not even trouble to declare itself officially a republic—so much was the form of government taken for granted. From the strictly legal viewpoint the National Assembly was revolutionary; and it never legalized itself democratically. The government elected by it remained provisional until it was confirmed by the first parliament regularly established under the new constitution, in 1920. Another anomaly was the National Assembly's election of Thomas G. Masaryk as president for life on November 14, 1918—an act seemingly at variance with the democratic principle of continuous responsibility of the executive toward the parliament and the people, though justified by Masaryk's merits in the creation of the new state and the confidence of the people in his democratic personality. Masaryk assumed office upon his return to Prague on December 21. In spite of its wholly anomalous origin and structure this National Assembly wrote one of the most successful constitutions of the postwar period.

#### THE PROVISIONAL CONSTITUTION

The primary task of a national assembly would seem to be to frame a constitution. But this is not borne out by history. Other things come first. After electing a president (speaker) and his collaborators and adopting standing orders—which, as a rule, are those of a previous parliament since there is no time for elaborating new rules—a national assembly finds its most urgent business in regularizing the position of the provisional government and establishing a new government for the period of its own life.

The 'political implications may have such bearing on the constitutional future of a nation after its rebirth or revival that a precise understanding of the chronology of steps and phases seems indispensable. When after the Second World

War a national assembly is convened it will find in office a provisional government, of revolutionary origin and without a democratic mandate, which has been operating for a considerable time by authoritarian methods and may be inclined to perpetuate itself. The revolutionary provisional government is duty-bound to return its powers to the duly elected national assembly as the representative of the popular will, the instrument of democratic legitimacy. There is no case on record of failure of a provisional government to surrender its powers to the national assembly.\*<sup>84</sup> But it may be different after this war. The danger can be met only if the national assembly, with the plenitude of powers, derived from the election, will either itself assume the responsibility to govern, or replace the provisional government with a government of its own. Historically, two alternatives offer themselves:<sup>85</sup> (a) The national assembly itself governs. In this case it not only holds the constitutional power by virtue of its mandate from the people; it exercises simultaneously the legislative and executive functions. Popular sovereignty, by way of delegation, becomes parliamentary sovereignty—something altogether undesirable. This was the solution the French chose in the Convention of 1792–1795, the first case of what has been properly called the dictatorship of an assembly.<sup>86</sup> The experiment was repeated in 1848 when the French Constituent Assembly (elected April 23–24) delegated executive power (May 9–10) to a commission of five of its members.<sup>87</sup> After the June riots it designated General Cavaignac as “president of the council,” thus approximating a government under the control of the assembly. In the years after 1871 the sequence of 1848 was at first duplicated. Thiers, elected as executive agent, was subordinated to the assembly; later MacMahon was elected president independent from it. But the French had learned their lesson: unlike Louis Napoleon Bonaparte, who had been elected by the people under the constitution of November 4, 1848, MacMahon was elected by the assembly. That the National Assembly itself should

\* On the resignation of the French Government of National Defense in 1871 see *supra*, p. 246.

run the government was found impracticable, because of its size, and of the diversity of party interests.

Consequently, the most immediate task of a national assembly is to determine the exercise of the executive functions by a government and its relations to the assembly. This is done almost invariably by a provisional constitution, although this name is rarely applied to the act. The Rivet law and the Broglie constitution are illustrations.\* Space forbids even the dry enumeration of the intermediary constitutions passed by national assemblies after the First World War. A pertinent illustration was the law "on the preliminary power of the Reich," enacted by the Weimar assembly on February 10, 1919.<sup>38</sup> By it the national assembly assigned to itself the elaboration of the constitution and the enactment of "other urgent Reich statutes," and likewise established the Reich president as head of the executive power, to be elected by the assembly. In turn the Reich president was to appoint the Reich government which operated under the parliamentary principle of confidence of the national assembly. Details are not relevant for this study. But it preluded, on broad lines, the future constitution. On the same day Ebert was elected to the office of Reich president *ad interim*; and he constituted the first government as a coalition of the Socialist and moderate bourgeois parties.

The situation in the Reich was duplicated in all *Länder*, each of them at the earliest possible date giving itself, through its national assembly,<sup>39</sup> a provisional constitution to remain in force until the final constitution should be drafted and enacted.<sup>40</sup> The only state not to toe the line was Bavaria.<sup>41</sup> Bavaria led Germany on the path to revolt against the Imperial System (November 7 and 8, 1918). The provisional government originating spontaneously from the revolutionary soldiers-and-workers-council of Munich, was headed by Kurt Eisner, an Independent Socialist, and Erhard Auer, a leader of the Majority Socialists. Eisner, to his, Bavaria's, and Germany's misfortune, happened to be a Prussian, a Jew—in pre-Hitler Germany these two qualities were not mutually exclusive—a

\* See *supra*, p. 262.

journalist, a starry-eyed idealist, and an internationalist who wished to play a role in world politics. No person more unsuited to be the leader of a Catholic and emotionally unstable people like the Bavarians could have been found. He became prime minister by revolutionary legitimacy and at once brought Bavaria into conflict with the Reich. Moreover, the revolutionary soldiers-and-workers-council in Munich was harder to crack than similar Soviet-inspired agencies elsewhere. Eisner, well aware that elections for a national assembly would make short shrift of the leadership and radical aspirations of a "foreigner," was more intent upon perpetuating himself in power than on returning to democratic legitimacy. He used the *ad interim* constitution as a lever to frustrate the result of the elections. The document, promulgated as a "statute" <sup>42</sup> on January 4, 1919, assigned to the provisional government (*Gesamtministerium*) the totality of executive and legislative powers until the final constitution was completed by the national assembly, which, implicitly, was to be deprived of the regular legislative functions and of political control over the revolutionary provisional government. Moreover, the government reserved to itself the right to submit all decisions of the assembly to a popular referendum—which Eisner, crude amateur in political psychology and constitutional law, believed to be an instrument of revolutionary dynamics although in reality it always operates as a brake on progress. The Bavarian electorate, as could be expected, disowned Eisner and his radical ideas, by voting overwhelmingly for the moderate Socialist and the Catholic parties. Eisner himself, on his way to the opening session of the Diet (February 21, 1919), was assassinated by a reactionary ex-officer of the army, and Bavaria catapulted into the short-lived Soviet republic, later downed by the military force of the Reichswehr and white terror of the enraged bourgeoisie. Bavaria, in the wake of the ferocious reactions, became the German "cell of order," the haven of anti-republican activists, the cradle of the Hitler movement and the locale of the Hitler putsch in 1923. It thus assumed a role in world politics which no one would have

wished for that lovable though rather thick-headed and volatile people.<sup>43</sup>

Austria is distinguished by having had two national assemblies after the dissolution of the Dual Monarchy.<sup>44</sup> The imperial manifesto of October 16, 1918, promising federalization to the impatient nationalities, came too late. Their secession left the German-Austrians high and dry to shift for themselves. On October 21 the 210 German deputies of the House of Representatives, belonging to the Socialist, Christian Socialist, and German National parties, formed the provisional national assembly (the same method had been resorted to in the Czech territories of the Dual Monarchy). The assembly, on October 30, 1918, enacted the provisional constitution; the assembly itself, exercising supreme authority, was to hold power until a definite national assembly, corresponding to the will of the people, could be convened by general elections. An executory committee of the assembly, styled Council of State (*Staatsrat*), was charged with the functions of the provisional government. The provisional constitution, deciding on a democratic regime operated by parliamentary supremacy, anticipated the future choice of form of government to such an extent that the subsequent formal declaration of Austria as democratic republic<sup>45</sup> was declaratory only. What was intended as a provisional arrangement became the definitely charted course of the Austrian republic. It should be remembered that at that time the territorial boundaries of the nascent state were still in flux.<sup>46</sup> The urge for constitutional normalization was as strong in Austria as in Germany. Elections for a constituent national assembly were held on February 16, 1919. The assembly was convened in Vienna on March 4. Within less than two weeks the national assembly enacted an elaborate provisional constitution of its own, the so-called constitution of March 14,<sup>47</sup> which remained in force until the regular parliament—officially styled also national assembly—was convened under the new constitution of October 1, 1920. The provisional constitution thus lasted for more than one and one-half years.

The use of a provisional constitution for the interval until

the final constitution had been drafted and adopted, was followed likewise in the succession states.<sup>48</sup> Here the provisional constitution was even more important than in Germany because the national assemblies could not concentrate at once on drafting a constitution and reaching constitutional normalcy. Conditions were unsettled in countries which suddenly had come of age; boundary disputes led to international complications and even military operations; traditional feudalism clashed with the social demands of the masses; none of these new political entities, except Austria, had a workable administration. No wonder that in many cases the national assemblies were preoccupied with tasks more urgent than the drafting of a constitution.

A provisional constitution by a national assembly, technically inevitable as it is, is not without inherent dangers. Intended to be a temporary and transitional arrangement, it is apt to anticipate the final solutions which should be reserved to the definitive constitution. There is enough historical evidence to show that the provisional constitution becomes a heavy mortgage on the future in that, as the nuclear pattern of the definitive constitution, it easily "freezes out" desirable changes. What appears expedient in the first stage of democratic incubation may not always be the best solution for the future. This is an undesirable result; but it is difficult to see how it can be avoided unless an assembly is elastic enough to emancipate itself from its own past.

#### THE FRAMING OF THE CONSTITUTION

##### (1) *The Conditions of Success*

The principal task of the national assembly is to frame a constitution. This is the purpose for which it is elected. True, the original connotation of representative government—that is, that the elected representatives constitute the intellectual and moral elite of the people—has lost much of its reality in our age of mass democracy, party machines, and professional politicians; but it is still real to the extent that the parties will

make an effort to delegate into the national assembly the best talent available. National assemblies in the past were, as a rule, of a decidedly higher caliber than the routine parliaments. A comparative sociological study on their personnel would be decidedly rewarding. The vast material investigated indicates that the leaders in the national assembly are not necessarily the men prominent in the opposition under the overthrown regime. Frequently the moderates, the middle-of-the-road men, dominate. Men who participated in government and administration hold key positions. Leaders of the ousted regime are rarely elected; their time comes later. There is usually new blood added to old experience but not enough to make a national assembly genuinely radical. The most striking fact is the tenacity of the existing party cadres. Completely new parties, as a rule, do not emerge.

But the success of a national assembly in drafting a constitution is not dependent on the quality of the deputies alone. History shows that an assembly can fail in its primary task, in spite of eminence in its members. The French National Assembly of 1871, after years of labor, had to be satisfied with five skeleton constitutional acts which fell far short of a completed constitution.<sup>49</sup> After the First World War the constitutions in preparation in Austria and in Poland had rough sailing; they were in jeopardy at times and were completed only after inordinate delay.<sup>50</sup> A national assembly can succeed in its main task only if the parties composing it agree on the fundamental assumptions of their future political existence. The greater its political homogeneity, the greater the chances of unhurried though purposive completion of the constitutional draft.

On the homogeneity of public opinion and the correlative degree of agreement on fundamentals depends largely the time the national assembly spends on writing a constitution. The length of the process also depends on whether the assembly has to build from scratch, or whether it can construct the constitutional house on serviceable existing foundations. The accomplishment of the Philadelphia Convention is all the more

striking when one considers that it constituted the first experiment in making a federal system effective over a large territory. That the German Reich and the *Länder* after 1918 accomplished the transition from monarchy to republican democracy within a relatively short period and without visible reverses, is hard to reconcile with the general assumption that the German people are politically immature and congenitally incapable of compromise.<sup>51</sup> In the succession states, constitution making took considerably longer, because of unsettled internal conditions and international complications.<sup>52</sup> While, thus, neither the rapidity of the constitution framing done by the Philadelphia Convention (1787), the Belgian National Assembly (1830), and the National Assembly of Baden (1919), nor the excessive delay of the French National Assembly of 1871<sup>53</sup> should be taken as yardsticks, it is safe to say that in the past, even under most auspicious conditions, the task took a year and more. Under the prevailing economic and social disorganization after this war, it will take no less time. If, within three years after the end of the European war those nations which are permitted to exercise internal self-determination have reached constitutional normalcy, it will be no mean achievement of political reconstruction.

## (2) *The Constitutional Commission*

How does a national assembly proceed in framing a constitution? A multi-membered body<sup>54</sup> like a plenary assembly is wholly unsuited for dealing with technical and controversial problems. The proper and customary method is to place the responsibility on a constitutional commission, consisting of members either freely elected on their personal merits, or delegated into it by the parties represented in the assembly in proportion to their strength. If properly constituted—and proportional representation of all major parties seems to be the basic prerequisite—the constitutional commission is the national assembly in miniature. Thirty members seem to be the operational maximum. The commission, freed from other responsibilities, can concentrate on the important task. In the seclusion of the



committee room, it either elaborates its own project, developed from the proposals of the various parties and profiting from the expert qualifications of its members, or (which is more usual) it begins with a project prepared by the provisional government with the help of experts in its service.<sup>55</sup> Experience teaches that the best method of getting a discussion under way in any composite group is to submit a formal draft, regardless of the amount of change in arriving at the final product. Much depends, naturally, on the caliber of the members of the constitutional commission. But almost invariably the best legal and political talent available in a national assembly has been delegated into the commission, including men with experience in constitutional law (such as university professors, prominent lawyers) and persons familiar with matters of public administration (such as former ministers and high officials). A chairman who combines diplomatic skill with expert knowledge of constitutional law is invaluable.<sup>56</sup> It is through this small group of experts and technicians that the opposition can make its most constructive contributions, and that inevitable compromise solutions can be worked out without endangering the consistency and intrinsic unity of the project as a whole.

The work on the constitution is best promoted by the assembly as a whole by refraining from interference while the constitutional commission prepares the draft. It should not duplicate work by submitting in plenary sessions proposals of its own which will come before the commission in other ways. The parties have ample opportunity to make their wishes heard through their spokesmen in the commission. Competition with the work in progress in the commission will in most cases destroy its logic and unity, the two most essential qualities of any well constructed constitution. The negative examples of the French Assembly of 1871 and the Polish Sejm in and after 1919 testify to the wisdom of this advice. By no means is the plenary assembly confronted with a *fait accompli*; it can discuss the project elaborated by the commission when this is returned to it for the second and third readings required under parliamentary rules. The assembly should have confidence in

the designated members of the constitutional commission, in which party currents are faithfully reflected. It is a matter of record that the plenary sessions of most national assemblies after the First World War more or less abode by the new draft constitutions prepared by their constitutional commissions. Modifications were, on the whole, few and insignificant. The final submission of the draft constitution to the assembly, thus, is rather for acceptance as a whole than for improvement of details. This does not necessarily detract from the sovereignty of the assembly.<sup>57</sup>

### (3) *Public Opinion and the Drafting Process*

If a people, by framing a constitution, is to choose the form of government under which it will live it is essential that the national assembly write the constitution in the full light of publicity and in reciprocal contact with public opinion. The value of contributions from the public will largely depend on the interest the people take in their future form of government and on the confidence they have in the ability of the national assembly to accomplish its task. The government should submit its draft proposal to public discussion at the earliest opportunity, and the press should report regularly and extensively on the progress of the work inside the constitutional commission. The secrecy of the Philadelphia Convention offers no exemplary precedent. Likewise it is conducive to the crystallization of public opinion to place constitutional projects emanating from nonofficial sources before the public for discussion and comparison with the official drafts, and to make them accessible to the constitutional commission.<sup>58</sup> Whenever a nation has been called to redefine the bases and limits of its political existence, proposals of reform by influential authors have contributed materially to clarifying public opinion and mapping the course for the government and the national assembly. The wealth of such private efforts accompanying the work of the French Constituent Assembly of 1789 remains to this day an inexhaustible repertory of political wisdom. Before 1870 Prévost-Paradol's *La France Nouvelle* guided public opinion. In

Germany before the collapse of the Empire, Max Weber's realistic proposals for the indispensable parliamentarization of Germany<sup>59</sup> and Robert Redslob's masterly analysis of parliamentarism in its "authentic" and "perverted" forms<sup>60</sup> were on the desks of many men responsible for political reconstruction. If the statesmen in charge of rewriting the constitutions after this war are well advised, Guglielmo Ferrero's *Principles of Power* will become their source of inspiration and the ideological blueprint of political reconstruction, applicable to all countries desirous of rooting their constitutional existence in democratic concepts. No other book is in sight which presents the transcendental as well as the pragmatic value of democratic legitimacy with equal learning, lucidity, and logic. What is essential is that the people feel that their own future is at stake and that, therefore, they must contribute to its visible formulation. The national assembly must do its part to "sell" the constitution to the people. It will be remembered that the draft of the Russian constitution of 1936, when first published by the government, evoked the deepest interest among the people and brought an avalanche of suggestions and proposals which, according to reports at that time, were taken into serious consideration by the government. The more a constitution, necessarily filtered through the conduit pipes of the national assembly, is based on participation of the people in its preparation, the greater are the chances that a meeting of the minds will occur in the national assembly, and the more the people will consider it as their own work.

It is doubtful, however, whether such optimistic expectations will materialize after this war.\*

#### OTHER FUNCTIONS OF THE NATIONAL ASSEMBLY

Rarely has a national assembly confined itself to the drafting of the constitution and, after the completion of its work, gone out of business. The American Convention of 1787 was so fortunate as to be able to concentrate on the constitution without the burden of other tasks. Even the Belgian National

\* See *infra*, pp. 309 ff.

Assembly of 1830 had to devote time to the settlement of international questions concerning the new state. Practically none of the latter-day national assemblies has confined itself to installing the legal provisional government and elaborating the constitution; nearly all have transacted ordinary legislative business,<sup>61</sup> much of it incidental to the transition from war to peace, much of it in preparation and implementation of the constitution. For example, it is necessary to determine as soon as possible the validity of the laws enacted under the old regime, in relationship to the new political order.<sup>62</sup> In the past, this was relatively easy when no social revolution separated the new from the old order. In the period of reconstruction after this war, however, the decontamination of the legal and social order constitutes a task of the first magnitude, which the national assembly has to share with the provisional government. Likewise the national assemblies will have to devote much of their energies to rebuilding an efficient and trustworthy civil service and a reliable administration. Most important of all, however, is the function of the national assemblies in connection with the peace treaties and the eventual establishment of international institutions of a political, economic, and moral nature.

It is obviously impossible at the start to set a limit to the duration of the assembly, although occasionally this has been attempted. Its moral mandate will expire with the adoption of the constitution. However, it has become the habit to continue a national assembly as the ordinary parliament, after the completion of the constitution.<sup>63</sup> The national assemblies convened after the First World War invariably continued in this capacity. The practice is unfortunate. The assemblies are elected for entirely different purposes. The people should have the earliest possible opportunity to get the new constitution into operation by electing a new parliament and new government. But political expediency frequently is stronger than the demands of democratic orthodoxy. At any rate, the longer a national assembly remains in session, the less can it claim popular support.

## OTHER METHODS OF FRAMING A CONSTITUTION

*Imposed Constitutions*

To democratic legitimacy the national assembly is the most serviceable and common instrument of framing a constitution. Other means have been used, but none of them would satisfy present-day democratic standards. Under the monarchical system a king could impose ("octroy") a constitution which subsequently was accepted by the parliament. This practice would no longer do in our day. The first Napoleon had his constitutions accepted by the people through plebiscites; but the conditions of the popular vote thereon were such as to disqualify them as genuine choice of government by the people. The constitutions of the North German Confederation (1867), and of the German Empire (1871)—drafted by Bismarck himself to suit his own stature and none the worse for it—were agreed on by the German princes and ratified by the diets of the states. Participation of the people in the subsequent elections for the common Reichstag may be considered as popular acceptance. But such procedures, all peculiar to the authoritarian state, would hardly seem acceptable to our standards of self-determination, which require direct participation of popularly elected representatives in the actual framing of the constitution.

The practice of imposing constitutions cannot be revived without violating the spirit and the letter of the Atlantic Charter. The choice of the people must be articulate, unmistakable, direct.

*The Use of the Plebiscite*

However, democratic legitimacy would not forbid any one of these three alternatives: (a) a constitution drafted by a non-elective body or council, or even by a single person or a group of experts, is submitted thereafter to the electorate in a constitutional referendum; (b) a plebiscite is held prior to the convocation of a national assembly, to decide "the form of government" or certain specific political issues; finally (c) the

constitution framed by a national assembly is submitted to popular ratification.

### *A Necessary Clarification of Terms*

The term "plebiscite" is used in public discussions commonly though incorrectly for a variety of forms of popular vote. In practice, what is called a plebiscite is either a popular decision on territorial questions, involving a change of sovereignty (*territorial plebiscite*), or a vote on issues of internal political order, or system of government (*constitutional plebiscite*). The latter is better termed "constitutional referendum," and is today in regular and successful use in a number of states, while the territorial plebiscite is an exceptional event, occurring only when boundaries and political allegiance are to be determined. The constitutional referendum applies to a people's internal self-determination as the territorial plebiscite does to its external sovereignty.

With the territorial plebiscite we are not concerned here. It is implied—though by no means alone—in Article 2 of the Atlantic Charter: "[They] desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned." The statement repeats the Wilsonian doctrine of external self-determination which, after the First World War, was preferably manifested through plebiscites.<sup>94</sup> Seemingly the territorial plebiscite has lost much of its spurious magic. It is much less spoken of than after the First World War. Which is no cause for regret, because the territorial plebiscite is about the crudest thing that ever sprang from democratic fundamentalism.

The constitutional referendum is applied in two different ways. The more common form (called by the Swiss *Verfassungs-Referendum*) is the ratification by the electorate of a constitution or constitutional amendment adopted by a parliament, convention, or national assembly. It is a normal and wholly commendable device of popular government, part of the system described by the French theory appropriately as semidirect democracy. The other form is the plebiscite which antecedes,

and to some extent anticipates, the decision of the parliament, convention, or national assembly. It pertains to the *question préalable* which form of government is to be chosen. In this sense it is binding on a national assembly which subsequently, on the basis of the preliminary decision, has to draft the constitution. It is christened here "anticipatory" plebiscite.

### *Plebiscite and Dictatorship*

The plebiscite as such is a venerable institution applied by the Roman republic to the acceptance of certain legislative measures by the people (plebs) assembled as *comitia*. It was not confined to the Romans; as a matter of fact it is the basic manifestation of the collective will of a free people, appearing, however, primarily under rather primitive social conditions. Its modern use is an invention of the French Revolution. It owed its acceptance mainly to Rousseau's intransigent postulate of the immediacy of the popular will, which originated from his aversion to representative government; but it was fertilized to some extent by the cult of classicism of the Revolution, and, perhaps, by rumors of its practical use in the American colonies. In the Constituent Assembly of 1789, Rousseau was soundly beaten by the Montesquieu-Sieyès team favoring representative government; and the concept of direct participation by a people in its government lost ground in the fascination of the Assembly by the newly discovered magic of the representative technique.<sup>65</sup> But the Convention applied the constitutional referendum to the ratification of the constitution of 1793.<sup>66</sup> Napoleon, in the most spectacular manner, used it in the ratification of his authoritarian constitutions (1800, 1802, 1804); in all these cases the people had to vote on constitutions which were already in force by authoritarian decree.<sup>67</sup> It was Napoleon's skillful use of the constitutional plebiscite that gave it its bad odor and negative reputation. Subsequently it became a permanent fixture of French authoritarian regimes,<sup>68</sup> and the Vichy acts inaugurating the Pétain regime prescribed a plebiscite on the constitution subsequently to be elaborated. The republic consistently spurned an insti-

tution so incurably tainted by dictatorial abuse.\* For the Caesars of our day the Napoleonic practice became the inspirational pattern for imparting the "democratic magic" of dictatorship—more to foreign admirers, who were gullible or were ignorant of historic facts, than to their own people, who could hardly be deceived.<sup>69</sup> Minor dictators did not fail to see the point, and included the manipulated constitutional plebiscite in their repertory.<sup>70</sup> Nor has another dictatorship, which does not claim to be Caesaristic, missed the chances. The Soviets are dogmatically very fond of the plebiscite,<sup>71</sup> a residue of orthodox Marxism and Kautsky's enthusiasm for it. "Elections," qualified as plebiscites, were held in 1939 when the Russians, with Hitler's blessing, took over the Baltic states. It is likely that such "elections" will be held elsewhere by the Soviets as a "democratic" blind for annexation. One need not be a student of history to be suspicious of plebiscites that result in near-unanimity, staged under military occupation, with no alternative candidates to those appointed by the Soviets, and the opposition dealt with in the gentle way of "liquidation." Moreover, these plebiscites are territorial decisions, in spite of their announced intention to determine the government by "elections," because the people who participate are deemed to concur in annexation by the Soviets. Nothing, therefore, can be gained by the Russian use of the method.

These historical remarks are essential for understanding why the constitutional plebiscite—of respectable democratic parentage—has become thoroughly and, it seems, irreparably discredited, so that it is difficult to see how it can be redeemed as an honest instrument of democratic legitimacy, even if internationally policed. Most people who have gone through the motions under a dictator find the dice so heavily loaded in a plebiscite that it will not give honest results even if the players, for a change, are not crooks.

\* On the plebiscite by the Government of National Defense in Paris in Nov., 1870, see *supra*, p. 244.



*The "Anticipatory" Plebiscite*

And yet, it is by no means impossible that political reconstruction after this war will resurrect the plebiscite for determining the form of government. It seems to hold a strange fascination for democratic doctrinaires and for technicians in the foreign offices who are not necessarily democratic. Like proportional representation it hides under a shining democratic shell a thoroughly rotten core. In the light of history it seems almost incredible that responsible people urge the constitutional plebiscite in many countries—in Greece, Yugoslavia, Italy, perhaps Spain, Austria. Broadly, the plan envisages a decision by the electorate on the form of government: monarchy or republic. It seems to have become almost a national institution in the hectic constitutional history of Greece; she has had no fewer than three plebiscites since 1920: two (1920 and 1935) recalling an exiled monarch and one (1924) favoring the republic. The fact that three plebiscites on the same issue, within fifteen years, have resulted in opposite decisions should deter a people so bright politically as the Greeks from repeating the performance. In no case was the procedure honest, or public opinion unconstrained.<sup>72</sup>

We have discussed the problem on its merits in connection with the monarchy.\* The arguments against the plebiscite for determining the form of government, or the issue of monarchy versus republic, may be briefly summarized thus: At first sight it seems to be desirable, with the apparent simplicity of the procedure, to have a people decide by "Yes" or "No": "Should my country be republican or monarchical?" This issue alone could be decided by a plebiscite. Both "monarchy" and "republic" are generic terms, blanks to be filled by special arrangements which actually determine the use of political power and, thereby, the form of government. Any additional clarification—such as, in the case of a republic, "Should the government be parliamentary, or under the separation of powers?" or, in case of a monarchy, "Should the king be author-

\* See *supra*, pp. 201 ff.

itarian, or constitutionally limited?"—is impractical for the plebiscitary technique as well as above the intellectual level of the average voter. The oversimplification contained in the alternative "Monarchy or republic?" does not permit a rational and considered choice of form of government by the voter. The answer is vitiated by the very inflexibility of the question, permitting only "Yes" or "No." The seeming simplicity in the formulation of issues, superficially so attractive to many, is an irreparable defect. The value of the plebiscite for territorial issues, when a change of allegiance and sovereignty is involved, is more imaginary than real. It must be conceded that the common man is able to decide for himself whether he wishes to be a Greek or a Bulgarian, an Austrian or a Hungarian, a Pole or a Soviet citizen. But what intrinsic merit has the choice of an individual who sees only his own case, and fails to realize the higher values beyond his horizon?

In spite of its seemingly ultrademocratic character the constitutional plebiscite is unsuited to the decision on form of government. It is definitely inferior to a judgment arrived at by a national assembly. The latter may decide for monarchy if the monarchists elect a majority of their deputies. The issue of form of government, with all its manifold political implications, can be much better elucidated by an elastic assembly than by the rigid and oversimplified formula of a plebiscite. The technical requirements are the same, because establishment of electoral registers is necessary in both cases. Democratic government is representative government, even at the risk that the elected delegates depart from the will of the voters. Errors can easily be corrected by new elections. To reject the plebiscitary methods is not to detract from the sovereignty of the people. It prevents, however, perversion of the constituent power by a method unsuited for its proper manifestation.

#### THE "RATIFICATORY" PLEBISCITE

None of these counterarguments applies, however, to a plebiscite on a constitution previously elaborated by the national assembly. That the document will gain in prestige and

dignity from solemn ratification by the people is beyond doubt. The people have been fully enlightened by the preceding debates on the project in the assembly, provided that these have received due publicity. They can read the text of the completed instrument; they know what they are to vote on. The holding of a "ratificatory" plebiscite is highly recommendable wherever it is practical. There is hardly a more telling and effective demonstration of democratic legitimacy. The method has had outstanding success in Switzerland, both in the Confederation and in the cantons, where a referendum on amendments to existing constitutions as well as on new constitutions is an integrated part of genuine democracy.<sup>73</sup> In the United States, where the ratificatory referendum is in force in a number of states, its success has been less conspicuous, either positively or negatively, for reasons not inherent in the institution—state politics are less important in the public mind; and the hold of the political parties over the electorate is not challenged by the referendum, while in Switzerland the people frequently make up their own mind without following the party line. After the First World War the use of the constitutional referendum reached an all-time high, but more for constitutional amendments than for an entire constitution. Among the postwar constitutions only that of Baden made the constitutional referendum obligatory.<sup>74</sup> Most other states were satisfied with an optional constitutional referendum—at the request of the parliament, of the head of the state, or of a qualified minority of the voters.<sup>75</sup> The mandatory constitutional referendum on a new instrument of government is likewise not unknown in Latin America.<sup>76</sup> However, it would be asking too much in the postwar period of constitution making, to make the constitutional referendum compulsory in every case after the national assembly has adopted the draft of the constitution. Obviously the people of Danzig would have rejected a constitution which placed them, against their will, under the tutelage of the League of Nations. This situation may repeat itself. Where a nation is restricted in its internal self-determination—as some nations must be if peace is to be secured—the obligatory refer-

endum would provide a gratuitous opportunity for registering protest. The individual voter has less responsibility than his national assembly. It would be unwise, therefore, to take a doctrinal attitude toward a problem which must be solved in the light of actual political conditions.

## CHAPTER IV

### *National Assemblies and Constitutions in the Postwar Period*

#### SOCIAL REVOLUTION AND SOCIAL RECONSTRUCTION

The selective material on provisional governments and national assemblies after the First World War, submitted in the preceding chapter, must be accompanied by a word of caution if superficial parallels with the situation after the Second World War are to be avoided. The people after the cessation of hostilities are hardly capable of reaching out for political normalcy by elections for national assemblies as early as they did in 1918. In most states the vacuum in constitutional legality will last much longer. It is filled precariously by provisional governments of some kind or other—that have emerged from the resistance movements in some states, or were established with the benefit of constitutional tradition in others. Provisional governments are intrinsically authoritarian; and this means that the people continue to live under abnormal and nondemocratic conditions—martial law, state of siege, military occupation, or other systems of domination. This, in turn, means continued lack, or limitation, of individual security under democratic processes—a seemingly inescapable vicious circle. Liquidation of the Nazi legacy without upheavals, protracted unrest, armed clashes, and civil war between groups competing for political control would verge on the miraculous. At an early date it became evident that the Resistance, deeply split and, in many countries, Communist-controlled, resented disbandment and obstructed reintegration into the civilian order. Hun-

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See pp. 478-481 for footnotes to this chapter.

ger and devastation, large-scale displacement of populations, latent and patent dissensions among the great powers, unsettled boundaries, contribute to the tensions, much more than after 1918.

All these things happened on a minor scale after international conflagrations in the past. But there is an additional and wholly unpredictable factor. The overturn of 1918 was not a social revolution, but simply a violent change of the political regimes. This war is only the concomitant, or the final climax—is it final?—of a social revolution of staggering proportions. The nations which have passed through the totalitarian interregnum are changed from what they were when they entered it a decade and more ago, the Germans above all. A world revolution does not end like a committee meeting, on the fall of the chairman's gavel. It is bound to go on. Who is so bold as to say that the people still have the confidence in the magic of written constitutions that they had (did they have it?) before they were engulfed by the totalitarian flood. Will they care as much for national assemblies and constitutions as their fathers after 1918? It was difficult enough then to restrain the demobilized soldiers, trained to violence and decorated for proficiency in it. The untold cohorts of partisans, patriots, Resistance fighters have to be fitted into a totally disorganized economy. How eager are these elements for a national assembly which, to all intents and purposes, would not be their instrument to forge the political future? Legalized lawlessness does not end at once by itself. In ravaged lands the masses care more for their daily bread than for political institutions. In short, the impact of the social revolution on the prospects of constitutional normalcy cannot be measured in advance. At best it will require a long internal cooling-off period, in all except the politically mature states, to prepare the people for the return to legality and legitimacy. True, in the western and northern European states recovery from revolution is proceeding at a more rapid pace than pessimists could foresee. Finland, with her unbroken democratic tradition, holds the record by normalizing her government and represent-

ative body as early as March, 1945. But in the Axis countries proper and their satellite states the interim between the Nazi regime and a democratic order of their own is bound to last for years. This time lag has to be bridged, as will be demonstrated in the last section of this book, by what may seem to be the constructive solution of placing them under the political tutelage of the United Nations.\*

Moreover, the provisional governments or other authorities in control through the transition following the war are so preoccupied by the demands of physical reconstruction that constitution making (for which the national assembly is the technical prerequisite) by necessity takes secondary rank. The task is more gigantic than after any previous holocaust. In the territories over which the fury of the war has swept, administration is more imperative than legislation. Devastated areas have to be cleared; houses, bridges, roads have to be rebuilt; food has to be raised and distributed; millions of displaced persons—prisoners of war, deportees, refugees, entire transferred populations—have to be resettled and adjusted; factories have to be converted and reequipped; currencies to be reconstructed or maintained. The demands on the daily agenda of the provisional governments outweigh by far, in the minds of the people, the writing of a new constitution which cannot feed, clothe, house them.

#### ADMINISTRATIVE RECONSTRUCTION

In addition, other things of an eminently political nature are to be done which far overshadow in importance the convening of a national assembly and the writing of a new constitution. For practical reasons the problem of what may be called the purification of the social life and the decontamination of the political order takes precedence with the provisional governments, acting either on their own responsibility or in conjunction with the occupation authorities. It is impossible, here, to do more than suggest the problem. When the Napoleons fell, society and people remained very much the same under the

\* See *infra*, pp. 329 ff.

new regime. All that was required was exchange of a small group of political leaders, and not even all of them. After the First World War, neither the social structure of the German Empire nor that of the Dual Monarchy basically differed from what had existed. By contrast, the last decade has been the first European experience of totalitarianism. Never have political tenets penetrated so deeply into all layers of the population; never have they affected all actions of the daily life to such an extent. Reconstruction after this war is confronted with a change of values. The cataclysmic destruction of moral standards by the totalitarian philosophy calls for more than a superficial change of colors or symbols. Much of the recovery from revolution will move on the higher plane of morality, inaccessible to law and legislation.

Any sustained effort to transform the totalitarian revolution into democratic legitimacy requires purging of the civil service and administration.

Previous periods of political reconstruction offer few if any parallels. The first restoration in France removed some of the prefects appointed by Napoleon. So did the Government of National Defense in 1871, badly handicapped by the war in progress. The Weimar republic dug its own grave by being satisfied with the glib declaration of officialdom that it accepted the actual situation in the ominous clause "*sich auf den Boden der gegebenen Tatsachen stellen*" (accept the given situation). No further proof of loyalty was demanded or given, and so the republic kept implacable enemies on its pay roll. The single precedent of such large-scale internal renovation is the Bolshevik revolution of 1917. At that time our hearts went out in sympathy to the innocent victims of a whole class "liquidated" in the interest of the new order. Today there are more among us who realize that the Tsarist aristocracy deserved to perish, and that the bourgeoisie did not die in vain. In the birth of a new world the cruel surgeon has to sacrifice the mother that the child may live. The returning democratic order cannot be expected to use the knife with the same ruthless efficiency. None the less, a very considerable de-



gree of renovation of the administrative personnel tarred with totalitarianism became necessary. Unless the totalitarian incubus is exorcised, and the totalitarian corruption cut out, the democratic order will not be safe.

The situation is relatively simple in the liberated countries of Western Europe. All had their full of collaborationists, Quislings, and Fifth Columnists, open or camouflaged. But these were small in number compared with the public officials who remained loyal to democratic tenets and the traditional form of government. Such officials, intellectuals, and industrialists as collaborated openly with the enemy are known to the people and will suffer for their acts. In the early stages of liberation the Resistance took the law into its own hands and dealt with many of them according to the law of revolution. The slaughter of Mussolini was the fitting end of a revolutionary career, a page from the book of the French Revolution. As these lines are written, military tribunals and special courts in the liberated states are meting out stern justice, executed by firing squads.<sup>1</sup> Persons who, in the world holocaust of moral values, have preserved a modicum of legal conscience are torn between the desire for vengeance and the insistence on justice according to law even for the vermin of the Fifth Column. One may doubt whether Articles 75 ff. of the French Penal Code, on treason and intelligence with the enemy in wartime, were not made inapplicable to collaborationists when the legal government of France, Vichy, signed an armistice with the Germans which formally terminated war. And is it not true that most or all of the judges of the Right Court of Justice at one time or another swore the oath of allegiance to Vichy's Chief of State, Pétain? But such thorny problems must be left for the French themselves to decide, and even if we have lost belief in the inalienable and illimitable right of internal self-determination we must admit that foreigners with subtle legal qualms have no right to dissuade the French from their fervor of political purification. A more harrying thought is that, while justice will be done to open collaborators with the Germans, retribution will pass over the much more dangerous class of persons in social

and economic posts of leadership who, without overt collaboration, acted so as to undermine the republic, and that they will form a latent danger to the lasting moral regeneration of France. We cannot easily forget that, before the invasion, the Cagou-lards and the Croix de Feu and other authoritarian-minded groups in the upper classes helped to prepare Hitler's New Order.

But in other liberated countries of Europe the purification of government from totalitarian activists, collaborators, and sympathizers is much more difficult. The provisional governments are caught on the horns of the same dilemma that confronts the occupation authorities. Too complete a change in administrative personnel necessarily disrupts reconstruction. No purge at all would jeopardize the new order. Obviously all political officeholders had to disappear at once. But this will not solve the problem in Germany, Italy, Austria, Croatia, Hungary, and other countries where all public officials were "coordinated," joining the party either voluntarily or to avoid dismissal from office. Their wholesale dismissal would stop the administrative machinery. The purge, therefore, must be gradual and selective—confined to the higher ranks of the bureaucracy except in particularly glaring cases. The criterion should be whether the coordination was voluntary or under duress, with the burden of proof on the official. An honor court (most European states have disciplinary courts for dealing with administrative offenses), composed of officials not tainted by collaboration with the regime, should pass upon each case. The degree of participation in the regime should be considered, and membership in the totalitarian party would, as a rule, be ground for dismissal only if accompanied by gratuitous activities in its support. Perhaps it will be found that the number of totalitarian activists and party zealots among the officeholders was smaller than we presume. That the officials will not enjoy vested rights and tenure, for a considerable time to come, is regrettable but inevitable.

## DECONTAMINATION OF THE LEGAL SYSTEM

Liquidation of the Nazi heritage in the social and legal order is an even more difficult problem. It was attempted at once in the liberated states of Western Europe. Again there were no historical precedents. In the past a change of political regime invalidated only such existing laws as were in conflict with the new political order.\* Necessary adjustments were left, as a rule, to a national assembly. After this war the problem is relatively simple in some of the Western states overrun by the Nazis. In advance, their governments-in-exile have invalidated measures taken by the occupation authorities.<sup>2</sup> However, in countries where the impact of the social revolution is deeper, wholesale and sweeping invalidation of existing laws would leave a lacuna which, until it was filled, would constitute a serious impediment to economic reconstruction. It is easy to decree the illegality of the racial legislation as of now. But how can the dispossessors be dispossessed, the loot be returned to its legitimate owners, compensation be assessed for losses incurred through the transference of property? <sup>3</sup> The body of Nazi legislation since 1933 cannot be invalidated *en bloc*—but considerable surgical skill is required in preserving what is socially sound while cutting out abuses. For this formidable task, it is hoped, the occupation authorities will prepare the way. The provisional government must act without delay. The task cannot wait for the national assembly to convene. It is difficult to reconcile democratic justice with the intrinsic purpose of any legal order, which is to preserve stability in the daily life of the people.

## PROBLEMS CONNECTED WITH THE ELECTIONS

Political reconstruction after the war is impossible with strict adherence to democratic fundamentals. This is most perplexing and, to many, discouraging. Equality, a democratic tenet, must go by the board, if democratic legitimacy is to be firmly established. In the elections for the national assembly

\* On the so-called Transition Acts after 1918, see *supra*, p. 280.

political rights cannot be accorded to all without distinction; the new democracy must be militant and self-assertive from the start.

#### THE MAJORITY SYSTEM PREFERRED

Of cardinal importance is the choice of the technical system under which the elections are to be held. It should be one under which the average voter can choose his party and his party candidates, and under which his vote contributes its proper share to the ultimate result. It would be simple to apply the electoral laws which were in force prior to the Nazi seizure of power; but this is possible only in states which enjoyed democratic electoral systems. To return to the restrictive electoral techniques fashioned by the authoritarian regimes of Poland, Austria, and Yugoslavia would be to slap democratic self-determination in the face. The plans of the French Committee of National Liberation, seemingly not modified by the provisional government, are obscure on this point. No basic change of the electoral regime of the Third Republic is intended. However, women are entitled to vote, and the ballot for the national assembly will be secret and direct.<sup>4</sup> But even in states with democratic antecedents return to the pre-Nazi or prewar system is inadvisable if that was based on proportional representation.<sup>5</sup> There is no need to recapitulate the arguments against proportional representation.\* They gain doubly in weight when applied to a national assembly. The doubtful advantage of mirroring all shades of public opinion is too dearly bought by the fragmentation of the assembly itself, difficult to reconcile with the compromise solution which every constitution based on free discussion is and must be. It would be catastrophic if splinter parties, the vice of continental parliamentarism, were encouraged to blur the broad lines of policies which public opinion must follow in drafting a workable constitution. Political reconstruction is much better accomplished by few and large parties, than by many and small factions or fractions of parties. Moreover, proportional rep-

\* See *supra*, p. 120.

resentation tends to depersonalize the voting process, with its soulless lists of candidates concocted by anonymous party conventicles or by party bosses (no European country has ever tried the technique of primaries) instead of living personalities. Men are to write the constitutions and not party machines. In an election to a national assembly even more than in one to a regular parliament the voter should consider his vote as a personal trust, and not just an expression of party allegiance.

It is suggested, therefore, that for elections to a national assembly the majority system should be universally applied.<sup>6</sup> If subsequently the assembly decides, in any country, in favor of proportional representation for future elections, it may do so. The British people were able to retain the beneficial two-party system—still the most effective form of parliamentary government—only because they obstinately refused to be lured into the political quagmire of proportional representation. What is good enough for the British may be good enough for other peoples. The majority technique calls for the choice by the voter between different personalities after the parties have selected the candidates, and it gives a better chance to prominent men to become candidates. In most states it may be suitably combined with the second ballot (“run-off” election) to guarantee that the elected deputy is actually the choice of the majority and not just of a plurality of voters. The usual objections to the second ballot may be less important because, in giving a candidate the votes of other parties than the one to which he belongs, it strengthens the representative character of his mandate. The introduction of the majority system necessitates a redistribution of seats and other technical adjustments which at any rate will wait until the absent voters return and settle down. These technical difficulties make it advisable to postpone elections for national assemblies much longer after the Second World War than after the First.

#### RESTRICTIONS ON FRANCHISE AND ELIGIBILITY

The problem of eligibility is different from that of active and provable collaboration. It would seem to be democratic

justice that persons specifically responsible for the totalitarian regimes should be automatically disfranchised, and that all members of the Nazi party be considered as perpetually undeserving of participation in democratic government. Provided that the membership lists have not been destroyed by the Nazis, it would be technically possible to make them second-class citizens, as they made the "non-Aryans." The German problem need not be discussed here because the United Nations, if they are well advised, will bar elections for a German national assembly as long as Nazism remains even a remote possibility. But a similar problem will pose itself in every country which had a fascist party; and there is none which was completely free of the totalitarian virus. However, disfranchising indiscriminately whole groups or even individuals is not suggested, unless a court has deprived them of the vote. Such a wholesale degradation—the Fascist party in Italy counted somewhat over two million members in 1940<sup>7</sup>—is not only undemocratic; it is unrealistic and defeats its purpose. We do not know how many Fascists were moved to join the party by reasons of human weakness that are at least understandable. They may not be ideal timber for the making of honest democrats; but official stigmatism as second-class citizens would harden them into incorrigible opponents of democracy. They must be given the chance of redemption. Moreover, it is much better to have the obdurate totalitarians vote, if they wish, for a national assembly than not to let them vote at all, because then a considerable minority could contend that the assembly did not represent them and its decisions did not bind them. It will be less harmful to let them vote for the parties closest to their political inclinations than to bar them from voting.

#### ADMISSION OF POLITICAL PARTIES

On the other hand, it would be intolerable to let the totalitarian parties or their auxiliaries regroup and participate, under any camouflage whatever, in the election of a national assembly which is to draft a democratic constitution. It would be folly to permit the Rexists of Belgium, or the National

Socialists of Holland, or the Arrow-Cross hooligans of Hungary to take part as an organized group in an election, even under an innocuous party label in which the appellation "democratic" figured prominently. The first elections in France held after the liberation were unable to cope with this problem. Once more, the renovation of democratic legitimacy has to take deviations from its own principles in its stride. It may be mentioned that in some Latin American states the winning party after a successful *coup d'état* has occasionally indulged in the unsavory practice of excluding the losing party from the election which subsequently "legalized" the seizure of power.<sup>8</sup> Such acts of party arbitrariness cannot serve as precedents for a policy dictated by the *raison d'être* of the democratic state of the future. But to bar pseudo-democratic and crypto-authoritarian parties from participating in the election of a national assembly is self-defense for the nascent democratic order, and it is the duty of the provisional government, or a special agency created for the purpose, to see to it that such parties are excluded. Nothing, however, can be done after the defeat with ignominy of any political regime to prevent its supporters from seeking refuge among respectable parties, preferably parties formerly in opposition, and, once under cover, from biding their time.

#### QUALIFICATIONS OF ELIGIBILITY

The threat from authoritarian groups and persons using a democratic alibi to throw their weight against a democracy in the elections is considerably lessened by the exclusion of undesirable parties, and especially of undesirable persons, from the right to stand for the national assembly. No such problem presented itself after the First World War, because the regimes overthrown by the revolutionary and secessionist movements were not totalitarian. Consequently, in the national assemblies of Germany and the succession states were numerous prominent figures of the past, elected on the tickets of the democratically refurbished traditional parties. No great harm was done. On the contrary, their political experience stood the national assemblies in good stead. There was no abundance of new talent.

Leaders popularly identified with the old regime, such as Lüdendorff and von Heydebrand und der Lasa, were not elected anyway. Nor are there historical precedents in Europe other than Gambetta's attempt—already discussed—frustrated by Bismarck, to forestall the reappearance of the Imperial leaders in the French National Assembly of 1871.\* The French were realists and knew that men of the old regime would be helpful to political continuity.<sup>9</sup>

#### INELIGIBILITY IN THE AMERICAN RECONSTRUCTION PERIOD

But in the United States the Reconstruction after the War Between the States provides an important precedent for restrictions on parliamentary eligibility after the defeat of a political regime. A more detailed study than can be given here would be rewarding.<sup>10</sup> Probably not many people are aware that the ineligibility provisions of the Fourteenth Amendment of the United States Constitution nominally are still in force, as the lasting testimonial that in any civilized form of government rebels are outcasts unless they have given an ironclad proof of repentance and conversion.<sup>11</sup>

The role played by the noneligibility policy and by the oath of loyalty, as absolution therefrom, cannot be recapitulated here in full. But the problem of loyalty to the principles for which the Union fought carries some useful lessons which justify the submission here of at least some of the salient points.<sup>12</sup> On December 8, 1863, Abraham Lincoln issued his famous proclamation of amnesty, affecting all persons who had participated in rebellion, on condition that they take an oath of loyalty pledging support of all acts of Congress and presidential proclamations dealing with the issue of slavery.<sup>13</sup> In addition the proclamation provided that if at least one-tenth of the qualified voters of a rebellious state, who had taken the oath, had established a republican form of government and one in no wise contravening the oath, it should be recognized as the legitimate government of the state, and as such should be entitled to the full protection of the Constitution. Thus, the

\* See *supra*, p. 245.



oath of loyalty became the decisive criterion for the redemption of rebels and for the active participation of residents in the government of their state. No specific categories were exempted. The amnesty was universal, on the sole condition of taking the oath. The forgiveness policy met with strenuous objection from the radical wing of the Republican party, which alleged that the conditions of redemption were too light, including neither adequate penalties for the past nor sufficient pledges for the future. Andrew Johnson's heroic efforts, after Lincoln's assassination, to carry on his policy of leniency were frustrated by the hostility of the radicals in Congress as well as by the unreconstructed attitude of the majority of Southern leaders and people. President Johnson issued on May 29, 1865, a proclamation which modified Lincoln's broad program by granting amnesty to all except certain specified categories of rebellious Confederates, on condition of their taking the oath.<sup>14</sup>

Taking the oath was made easy enough; any federal official and any qualified official of a loyal state could administer it. A certificate confirmed the restoration of citizenship; a copy of the certificate was sent to Washington. Reintegration of the rebels, thus, was placed on a reasonably selective basis, and even persons excepted at first were promised a pardon through petition to Congress. In addition, the proclamation granted the states under reconstruction more rights of internal self-determination in dealing with their rebels and freedmen. The state conventions or legislatures thereafter could freely prescribe the qualifications for the vote or for office. But unpardoned rebels were forbidden to vote or to hold office. The importance of the oath of loyalty can hardly be overestimated: it was applicable to the members of the conventions to be established, to the state officials, to the senators and representatives to be sent from the reconstructed states to Washington. Granted, the situation implied some risks, but President Johnson was willing to take them.

But Johnson's tolerant policy of selective forgiveness was frustrated to a considerable extent by the recalcitrant attitude of the South and the vindictiveness of the North. This is com-

monly overlooked. The Thirteenth and Fourteenth Amendments, freeing the slaves and imposing repudiation of the rebel-contracted debts as conditions for readmission to the Union, were skillfully circumvented. The situation was aggravated by the fact that elections for the conventions were held under the control of the generals of the Union. The registration boards which had to decide on disfranchisement and disqualifications, were frequently composed of men hostile to the South or indifferent to its problems. The new electorate brought an entirely new personnel into the conventions—as Burgess says, "the most ghastly travesty of justice, common sense and common honesty which the republic had ever been called to witness."<sup>15</sup> The "Black Codes" testified to the unreconstructed spirit of the South, in spite of the oath of loyalty. The rest of the story need not be recapitulated here: it is part of American history and by no means one of the glorious chapters. Congress reasserted its right against the president to control reconstruction—a conflict which led the United States very close to the European type of parliamentary dictatorship, and, while it lasted, obliterated the system of the separation of powers. It led to the Fourteenth Amendment,<sup>16</sup> to Congressional (that is, military) reconstruction under the monstrously unconstitutional Reconstruction Act of March 2, 1867, to the impeachment, trial, and acquittal of President Johnson (February 24 to May 26, 1868), and to the Fifteenth Amendment. There was no Article 3 of an imaginary Atlantic Charter which guaranteed to the South the right to choose the form of government it wished: the form of government was rammed down its throat. The South answered through the Ku Klux Klan. Congress retaliated with savage reprisals,<sup>17</sup> until at long last the tide turned. In the reversal of compulsory reconstruction the Supreme Court had a decisive share.<sup>18</sup>

The conclusions to be drawn from the experience of the American Civil War era (other equally impressive lessons are beside the point here) are telling: There should be no wholesale exclusion from the franchise, by category, of people identifiable with a totalitarian regime. But neither must there be

a wholesale and sweeping admission to the national assembly or to office. To make redemption dependent on an oath of loyalty to the new democratic order would be a travesty of religion, what with the totalitarians' contempt for Christian ethics and the elementary precepts of morals. They would laughingly swear the blue down from the sky, and then break the oath whenever they felt like it, without a twinge of conscience. Exclusion from the vote and disqualification for office should be confined to the leaders active in authoritarian parties or antidemocratic groups and to persons prominent in the totalitarian order; but the line must be drawn in such a way as to bar all compromised persons from active political life. This implies simultaneously exclusion from any appointive position in government and administration. Individual redemption of members of the disqualified classes should not be permissible as long as Nazism or a local variety of it remains a threat, however remote.

The problem of restricted eligibility should occupy a foremost place in the period of political reconstruction.

#### ELIGIBILITY UNDER THE FRENCH PLAN OF POLITICAL RECONSTRUCTION

It is unlikely that General de Gaulle and his associates have given much consideration to the American reconstruction experience. Yet the solution provisionally adopted by the French Committee of National Liberation follows the same lines: no disfranchisement of classes of voters, but disqualification of certain categories of collaborationists for the reconstruction assemblies. Whether their disqualification extends to appointive offices is not indicated. Impediments of membership are identically applicable for the Algiers Provisional Consultative Assembly, the reformed Consultative Assembly, the communal and departmental bodies of the transition period, and the Provisional Consultative Assembly built up therefrom. As yet, no proposals for the final Constituent Assembly are known.<sup>19</sup> Disqualified are (a) members or former members of governments established in metropolitan France after

June 17, 1940; including the first cabinet of Pétain (wholly legal under the Third Republic), which succeeded Reynaud—a rather imprudent gesture of resentment; (b) members of parliament who in voting to delegate constituent powers to Pétain “forfeited \* their mandate” (they formed the overwhelming majority of the Chambers elected in 1936, and therefore France’s political life after the liberation suffers from a serious scarcity of practical parliamentary experience); (c) persons who accepted from the “so-called Government of the French State,” the Vichy regime, positions of authority, or seats in national, departmental, or Parisian municipal councils (this provision deservedly outlaws the Vichy appointees but very reasonably does not go down to the lowest level in the municipal councils); (d) finally—probably the most important category—those persons “who, since June 16, 1940, have directly or indirectly by their acts, writings or personal attitude favored the action of the enemy, or been harmful to the actions of the United Nations or French Resistance, or violated the constitutional institutions or fundamental public liberties, or knowingly derived, or sought to derive, a direct material benefit from the application of regulations issued by the *de facto* [Vichy] authorities in violation of the laws which were in force on June 17, 1940.” This general clause, directed against collaborationists in the widest sense, is elastic enough to purge whomever the provisional government wishes. But it is hardly consistent with the rule of law, because every grocer who sold vegetables at profit under a Vichy decree would come under the clause. There is, however, a saving clause for former parliamentarians and for Vichy officials who have rehabilitated themselves in the Resistance.

It was announced in February, 1945, that the government by ordinance disqualified collaborationists from voting in the municipal elections. The text of this decree was not available at the time of this writing. On the other hand, persons formerly prominent in fascist or pro-fascist groups and parties, unless qualified as collaborationists, are admitted to vote and are

\* *Abdiqué* in the French text.

eligible for office. Often the foreigner is unable to understand the French mind.

#### DISQUALIFICATIONS IN STATES FORMERLY TOTALITARIAN

In the majority of liberated states in western and northern Europe similar precautions are taken in order to neutralize conniving Quislings and cunning Fifth Columnists. The intensity and rigor depend on local conditions and the potential danger of the elements to be eliminated. But in states formerly totalitarian—Germany, Italy, Austria, and, to a lesser degree, their satellites—the problem is gigantic and hardly soluble by democratic methods. In the case of countries which, formerly under German domination, came under occupation by the victorious Soviets there is no longer room for a discussion of the issue on its academic merits. Reports are piling up that the Russians are dealing with fascists and collaborationists in a manner which would make it unlikely that these persons ever again will be able to vote or run for office. Such deviations from democratic standards as the procedure necessarily involves will be regretted by few.

Although, under the proposals submitted in the next part of this book, Germany would pass through an extended probation before electing a national assembly, it may not be altogether beside the point to suggest the broad categories of persons ineligible for election to the national assembly or any other official body on the state, provincial, or communal level. Obviously here disqualifications for elective functions must go beyond measures intended to purge the civil service on grounds of democratic “unreliability” in the past. A deputy protected by parliamentary immunity can do much more harm than a reinstated official removable for subsequent political misconduct.

— Again it seems hardly advisable to debar all former members of totalitarian parties permanently from suffrage or from office. While the party hierarchy of officials down to the provincial and local bosses should be barred without exception, more leniency may be shown to the Nazis and Fascists of the

rank and file. This does not mean that the lower categories should be indiscriminately admitted. For the sinister Catilinarians of the SS and the Gestapo, even of the lower ranks, there is no room in any office in a self-respecting democratic state. The plan to have them removed to Russian labor battalions seems to be the only just solution. But this is not enough. Of equal and even greater importance is the elimination of persons of influence who, with or without party badge, cooperated with the regime—including industrialists, businessmen, intellectuals, members of the professions, and journalists. The co-ordination technique was so effective that no person could remain in a responsible position unless he was considered to be thoroughly loyal. No alibi that he acted under duress or for "patriotic" reasons seems acceptable. To name only a few at random: Men like Furtwängler, the conductor, Rudolf Kircher, long-time editor-in-chief of the *Frankfurter Zeitung* and one of the highest-powered props of the regime, and Hjalmar Schacht—if they survive—have no claim to any public role in Germany after the war. Finally, the list of ineligible persons should include all former army officers down to the rank of major, in order to prevent the army from creating a parliamentary Fifth Column that will bring about its resurrection later. The number of disqualified persons might easily run into six figures. Official boards to investigate character should be established. If cleared, a suspected person would regain all his political rights. These boards could simultaneously supervise all professions affected with a public interest (lawyers, journalists, radio commentators, etc.) and prevent infiltration of politically undesirable persons into public life.

One general conclusion may be drawn from the preceding most tentative observations. For a long time to come, public life in countries formerly totalitarian can have little in common with that in a liberal democracy. Any conceivable restoration of individual-liberties democracy will be preceded by a period—of indefinite length—of "controlled" or "disciplined" democracy.

## CHAPTER V

### *What Kind of Constitution?*

This chapter will be brief. It is speculative, not factual; but perhaps it will be found informative.

#### THE BASIC DILEMMA: TRADITION VERSUS EXPERIMENTATION

It seems idle at this time to speculate on the content and nature of the constitutions to be written by future national assemblies. Yet the student of constitutional history has a number of known factors from which to figure the unknown  $x$  in the constitutional equation of the future. Whenever, in the past, an established political order has collapsed and a nation has had to decide on its own destiny, tradition has battled with experimentation. This basic dilemma is reflected in the new constitution. Tradition is never strong enough to make a nation ready to reverse itself completely, and to begin anew where it has once left off. On the other hand, rarely will it experiment with a constitution which deviates radically from the habitual national pattern. By the dialectics of the historical process the new political order, as manifested in the new constitution, is the parallelogram formed by the past experience and the expectations for the future. As a rule the forces of tradition are more persuasive than the allurements of the unknown and untried. Consequently, in all likelihood the individual nations will rather go back to what was good and salutary in their constitutional systems prior to the Nazi onslaught than embark on the unexplored and the new. Foreign experience is spurned by national self-confidence because it is foreign. Moreover, the desire of most nations for social and

See pp. 481-483 for footnotes to this chapter.

political innovations has been more than satiated during the totalitarian interval.

But there is another point which should not be ignored or minimized. What has happened in Germany, and in some degree all over Central and Eastern Europe, is a social revolution of the first magnitude. The bourgeoisie as a separate class has become nearly extinct. Vested interests have been destroyed, money and mobile property are valueless, landed property has been devastated. They are so far leveled down as to be impotent to defend the familiar pattern of the liberal bourgeois state. The backbone of the independent middle classes, one-time phalanx against Communism, is thoroughly broken. The techniques of one totalitarian system, Nazism, are so similar to those of another, Bolshevism, that German youth, without any nostalgic desire for a return to democratic normalcy, could easily be persuaded to continue and perpetuate the social revolution under the red flag instead of the swastika which anyway is affixed only to the red ground color. Inside the defeated nations the struggle between the rationality of the West and the streamlined mysticism of the East is protracted and intense. The spiritual vacuum left by the exploded myth of the *Herrenvolk* must be filled by something new and tangible. Vacillation between the West and the East is a determinant of German history.

#### SOCIAL DEMOCRACY AND POLITICAL DEMOCRACY

The possibilities of a large-scale Communizing of Europe—not just the politically fluid core of the continent—are such that they have a decisive bearing on the content of the future constitutions. To put the situation in the simplest terms: The substance and, to some extent, the form of the constitutions will be determined by economic forces and interests, rather than by concepts of the proper organization of political power; the emphasis is less on formal political democracy than on substantial social democracy. The state of the future must conform more to a democracy of social obligations than to a system of individual rights. If there is a recipe it is this: Europe must



go left, far enough left for the masses to obtain social justice without being driven into Bolshevism. The common man will be prevented from turning to Communism only by finding social security within the democratic order. The greater the guarantee of social justice, the less the appeal of Communist panaceas.

Applied to the content of future constitutions, this is a less revolutionary break with tradition than it may seem. Constitution making in the past stressed the formal distribution of political power, the frame of government, and left the substance to the interplay of political forces within the frame. The only determinant of content was the liberal bill of individual rights. It signified the liberal-bourgeois pattern of the modern state under the rule of law. This situation still prevailed when constitutions were framed after the First World War. But a new trend was clearly in the making, with awareness that the most skillful arrangement of the public powers is useless unless it serves the definite purpose of social solidarity—to use Duguit's pertinent phrase. The need for promoting social contentment among the masses of the people was reflected in the extension of the negative right to be free from interference by the state—the liberal bourgeois ideal under which private capitalism was able to fulfill its mission—to the obligation of the state to improve the economic position of the masses. Pre-Nazi political democracy broke down because political freedom without economic security is meaningless to the common man. It would be utter folly for the coming constitutions to ignore the lessons of the totalitarian interlude. The totalitarian state catered to the masses; and its solicitude for the common man, compensating him for political enslavement, has left indelible traces on his mind. He does not wish deliverance from political oppression only into economic and social despair. The liberal state and liberal democracy have lost the appeal they had for our fathers.

For constitution making this means two things: One is the insistence on definite institutionalizing of social security in the constitution itself, instead of the mere promise of such a pro-

gram of social betterment that the individual-rights democracy was willing to provide. If the parties of the left are in control they will write social justice as an obligation of the state into the new constitutions. It means, secondly, the realization that only a strong state can stand up against the forces of reaction—economic feudalism and private exploitation capitalism, cartels, trusts, and monopolies, internationally entrenched and waiting to be restored to their antediluvian domain. To put it positively, a strong state is nothing else than a strong government. The two issues are intertwined. Social security requires planning, and a state providing it needs wider regulatory powers than were necessary for the democracy of liberal *laissez faire*. The coming constitutions must place the responsibility for social security squarely on the state, and provide for a strong executive which will be able to devise it and willing to enforce it.

Social legislation, therefore, will and must become positive constitutional law. Social postulates, expressed as definite obligations of the state, will far overshadow the need for new technical arrangements in the organization of political power. The trend is indicated by the fact that the vast postwar plans of the United Nations center on social and economic reorganization, while political reforms in the narrow sense take second place.<sup>1</sup> The socio-economic patterns are uniform to the point of identity: efforts to secure full employment; raising the living standards; definite projects for social security; state regulation of industry; attainment of greater productivity with state incentives where private initiative proves insufficient; curbing of private trusts and cartels where they are not eliminated; protection of consumers' interests; in short, economic democracy as the prerequisite and corollary of political democracy. The most conspicuous illustration is Britain's Beveridge Plan for social security "from the cradle to the grave." Other measures to be included in the constitutions pertain to the nationalizing of communications, public utilities, and the means of transmitting opinion. But the most imperative postulate of postwar social democracy will be agrarian reform. Without

eradicating feudalism based on landed property, most states of Central and Eastern Europe cannot attain political or economic democracy.<sup>2</sup> One may deplore the Soviet's lack of democratic sincerity in setting up "friendly" governments of the left in the territories liberated by the Red army; but one cannot deny that the breaking up of agrarian feudalism in Rumania, Hungary, Poland and distribution of the landed wealth among the peasants is a huge step toward political democracy.

It is by no means impossible that social reform will utilize the totalitarian experience with corporative institutions. If purged of control by a single party or the government alone, representative economic or professional institutions may become essential instruments of economic planning; and they should not be thrown into limbo just because the totalitarian regimes put them to perverted use. Likewise, the public corporation experimented with by democratic countries as different as Britain, Switzerland, and Uruguay calls for careful scrutiny in the reintegration of economic life into the constitutions.

After the First World War, political democracy appeared to be the means of social democracy. After the Second, social (or even socialized) democracy has become the means to political democracy, or will be achieved at the expense of political democracy if a compromise between equality and liberty cannot be reached. For the common man, social equality will mean more than political liberty. The constitutions necessarily will reflect the dilemma by a basic reorientation of individual rights, particularly of the right to win and hold property—the mainstay of private capitalism. Liberty under the coming constitutions can be no other than "regulated liberty," to use Sir Cecil Carr's pointed phrase.<sup>3</sup>

The success of socialization in Europe depends on largely unpredictable factors. How rapidly will the bourgeoisie recuperate from its prostration under the Nazi juggernaut? How much voting strength will it be able to mobilize? How powerfully will the internal capitalistic interests interfere with social reconstruction? What will be the attitude of the Catholic

Church, ranking alongside the Communist party in many European states as the only other power with an integrated and intact organization? Will clerical influence side with the "little man" (as it did in Czechoslovakia and, to some extent, Germany) or with the bourgeois reaction (as in Austria, Spain, Poland, Hungary)? No responsible person can answer these questions in advance. Time will tell.

#### THE CHOICE OF THE POLITICAL PATTERN

It is a banality that, within the measurable future, there will be no model constitution, or generally applicable and nationally interchangeable blueprint of the fundamental order—no "best" constitution. The best constitution is the one best adjusted to an individual people, at a given time and under given circumstances.

None the less, the apparently inexhaustible variety among existing constitutions must not prevent the realistic observation that the number of basic patterns from among which the national assemblies will have to choose their form of government is relatively and absolutely limited. If the openly or secretly authoritarian or dictatorial form of government is excluded from choice, as it must be, there remain only five stereotypes of political democracy, and the Soviet form of government. To forecast, within the limits of reason, which of these will be accepted, is less unprofitable than it may seem when it is realized that the force of tradition in every nation is stronger than the impulse toward innovation and experimentation. Constitution making is not distinguished by much originality. A nation leaves the beaten track only if impelled by overwhelming social necessity. Very rarely in history has a nation been moved to make a complete break with the past and devise something entirely new, as the Americans did when they combined the republican form of government with the federal system, or the French when they bent the formidable reality of the absolute monarchy under the fictitious sovereignty of the people, or the Russians when, by a stroke more of the sword than of the pen they destroyed the equally

formidable power of private property. By force of tradition, which is almost a natural law, the nations framing new constitutions will hold as closely as possible to what they had before they were struck by the totalitarian bolt.

(a) *The American System of Separation of Powers*

Among the five available patterns of democratic constitutions the American system of separation of powers is ruled out in advance for European nations. It is true that some American institutions—such as the election of the head of the state by the people, and judicial review—have been imitated in the past, with varying success; but the system as a whole has never found favor in Europe and does not attract much interest except as an object of study. The details of its operation, its merits and demerits are more or less unknown even among educated people. Its working principles are alien to the European mind. An executive branch beyond the control of the parliament, and amenable to popular control only at relatively long intervals, is unsuited for Europe, which is used to a continuous interplay between the executive and legislative organs. Experts will point out that the separation of powers is a standing invitation to constitutional deadlock; that the federal solution is old-fashioned, clumsy, and unwieldy; that it is predicated on the two-party system; and that in Latin America it has led almost invariably to dictatorship. The United States will be popular in postwar Europe—at least we hope so: its great President, Franklin D. Roosevelt, who was the democratic St. George who slew the totalitarian dragon; its people, humanitarian and militant in the service of humanity; its resources and resourcefulness—but not its form of government.

(b) *The Swiss Directory System*

The same, though for different reasons, holds true for the Swiss application of political democracy. Its conditions are unique and irreproducible elsewhere. The failure of new constitutions after 1918 to adopt the Swiss pattern was not accidental; the semidirect institutions of referendum and initiative

were widely copied, but were not overly successful anywhere. Swiss democracy is much admired in Europe, and deservedly. But the essential feature of its political organization—the co-operation of the government with the parliament without dependence upon it—evolved through a long political growth and self-restraint which cannot rationally be introduced in other countries. No wonder that an imitation of the Swiss pattern in the "collegiate" government failed to integrate itself when applied in Uruguay after 1917.<sup>4</sup>

(c) *The French Pattern of Parliamentary Republic*

It will be natural for the peoples to turn, or return, to the parliamentary form of state organization under which they all lived, at least for some time, after 1918. The French pattern of republican parliamentarism was then the preferential form, partly for nontechnical reasons. Many of the leading statesmen of Eastern and Southeastern Europe had received their legal training in France. France's prestige after the victory of 1918 was at its zenith. However, for the era of constitution making which is about to begin, the French model has lost much of its luster. Did not the inherent defects of parliamentary supremacy, with resultant unstable cabinets, shifting coalitions, ineffective control of the electorate over the parliament owing to the obsolescence of the dissolution, provoke, or contribute to, the fall of the Third Republic? The glory of the French system has faded, with a loss to France of influence in the political reconstruction of Europe, and a spread of the French system is much less likely than after 1918. However, if the French are the first to construct a new constitution, bringing out a streamlined model in the constitution of the Fourth Republic (which, with their political genius, they may well be able to do), it cannot fail to inspire the national assemblies of many other countries. But the renovated pattern must recommend itself, by squaring the circle between a strong executive and popular control, to nations in need of an original solution of the otherwise indispensable technique of parliamentary representation.

(d) *Parliamentary Monarchy*

The two types remaining are the parliamentary monarchies of the British and of Central Europe.\* The British parliamentary monarchy approximates the parliamentary republic so closely that it could be copied without the monarchical accouterments—as the British Dominions, only nominally monarchical, and Eire, a republic, have shown. At the close of the Second World War the British political system has reached an all-time high in international prestige. It has survived the most serious strain to which any form of government can be exposed. As adaptable to the demands of social democracy as any other modern political design, it is unequalled in its elasticity and resilience. It has the patina of tradition and the glamour of success. In the constitutional sweepstakes of post-war Europe the British horse will be the favorite. But it will be realized that the system depends on the operation of two alternating parties. Will it be applicable to the multiple-party habits of the politically less mature European nations? Here are the natural limits to the adoption of any otherwise admirable political structure.

The chances of the parliamentary and constitutional monarchy of the Western European and the Central European type are unpredictable. The dangers of its perversion into autocracy have been outlined before † and need no repetition here.

(e) *The Soviet System*

Wholly beyond reasonable calculation are the chances of the Soviet system in Europe. Certainly no nation west of the Vistula would adopt it if the popularly elected national assembly had free choice. Where small independent farmers constitute a sizable part of the voting population, the peasant's ingrained sense of property will react violently against collectivization. In countries where the expropriation of large landed estates can and must be undertaken (Hungary, Rumania, Po-

\* See *supra*, pp. 159 ff.

† See *supra*, pp. 200 ff.

land), the step toward collective farm organization is easier and may be tempting. A landslide at the polls carrying into office parties pledged to the Soviet form of government is unlikely, although Communist parties everywhere have grown by leaps and bounds. But it is impossible to forecast whether it will be introduced in some countries by revolutionary forces working with the Kremlin, or by "spontaneously" established governments "friendly" to the Soviets. It is certain that the alignment of parties in the constituent assemblies will reflect a far greater attraction to the Soviet type of society and government than existed in 1918. The Communists have contributed the lion's share in the resistance movements. If they choose to participate in democratically conducted elections, they will offer strong, and in some cases formidable, competition to political democracy. Much if not all of the success or failure of political reconstruction will depend on the outcome of the momentous contest between these two forces.

#### THE PHENOMENON OF "FAMILIES" OF CONSTITUTIONS

Constitutional history since the eighteenth century reveals a curious phenomenon, wholly ignored by the science of comparative government. Constitutions originating in a given period tend to be influenced by an outstanding specimen of their kind. Following the law of imitation, they manifest a strange consanguinity, as descendants from a common ancestor. They conform to the *Zeitgeist*. Constitutions, like people, form families. Constitutions, like people, are subject to fashions, styles, and time-conditioned modes. The relationship between spiritual ancestor and progeny is well known in the arts; it is no respecter of national boundaries or habits. If this holds true of coming constitutions one may view the future world with optimism since, on the premises of this book, a certain similarity and affinity of political structure is the requisite of an effective international organization.

The historical evidence cannot be presented here in detail. That the constitutions of the thirteen American states after the emancipation from England followed a common pattern is ex-



plained by the common intellectual background and the uniform political heritage of the framers. But in the succeeding hundred and fifty years practically every generation produced at least one outstanding constitution, imitated, adopted and adjusted to national conditions elsewhere, within the lifetime of its first appearance. The American system of separation of powers became the pattern for practically all subsequent Latin American constitutions. The French Charter of 1814 procreated a litter of similarly legitimist constitutions all over Europe, extending even to Brazil and later Mexico. The liberal Belgian Charter of 1831 is another pertinent illustration. Napoleon I's concept of democratic Caesarism inspired all contemporary imitations. A most prolific family with national variations sprang from the Weimar constitution which, even in its agony, was godmother to the Spanish constitution of 1931. More recently the constitution of Poland (1935) with its ingenious camouflage of authoritarianism was widely copied by regimes in search of disguise for the power of a ruling class.

What conclusion can be drawn from this phenomenon for the period of constitution making after the Second World War? The basic implication seems to be that most of the coming constitutions will conform to an affinite structural pattern. Whenever different countries are confronted with similar problems the solutions, following the law of constitutional imitation, will be similar. Each country will observe what its neighbors are doing; they will try to learn from one another. As yet it is impossible to say which nation will mother the next family of constitutions. It will depend on which national assembly gets into the home stretch first, although the first constitution delivered is not necessarily the best that can be devised. Here is the chance for the French.

#### BASIC STRUCTURAL PROBLEMS OF THE COMING CONSTITUTIONS

The inference from the existence of families of constitutions is that the coming constitutions, in spite of national variations, will share many structural features on which their operability will largely depend. We must not expect a definitely

new and strikingly original pattern. On the contrary, tradition will assert itself. But we can expect definite technical improvements on the type of political democracy known before. The democratic solutions attempted after the First World War preferred liberty to authority, while the counterrevolution against democracy sacrificed liberty to authority. The nations seeking an alternative to authoritarian rule will have to build a democratic state which strikes a proper balance between authority and liberty. Some of their problems may be sketched here.

(1) *The Requirement of a Strong Executive*

The period between the two world wars was dominated by the unsolved and seemingly insoluble conflict between the parliament (reduced to impotence by multiple parties loosely combined in *ad hoc* coalitions), on the one hand, and the need for a government which was able to govern, on the other. The constitutions written after 1918 were animated by distrust of the executive. Invariably they provided for a strong parliament and a weak government. The trend toward parliamentary sovereignty was short-lived. In the middle twenties the tide turned; and it was accelerated by the world depression. Either the democratic states were converted into authoritarian or dictatorial systems,<sup>5</sup> or their parliaments, with sweeping delegations of *pleins pouvoirs*, abdicated in favor of the governments.<sup>6</sup> The memory of the chaos of parties and pressure groups disguised as parties has been so deeply stamped into European minds that a restoration of full-fledged parliamentary supremacy, at the expense of government and leadership, is unthinkable. Legislative efforts to limit the splitting of the electorate into parties and factions were artificial and unavailing,<sup>7</sup> and ended usually in authoritarian rule.<sup>8</sup> It is unlikely that a system could be devised which would limit the voters' choice to a few parties of general demarcation, such as left, right, moderate; it has never been tried, and could not accommodate "philosophical" or clerical parties.

Consequently, the men who write the new constitutions will have to decide for a strong executive and a weak parlia-

ment, or for a strong parliament and a weak executive. That the decision will be for a strong executive seems to be almost axiomatic.<sup>9</sup> The government of the new democracy must have the power to do what a government is supposed to do; namely, govern. The key is the delegation by the parliament of powers to the government. It will not be abdication if it is based on a new concept of the division of functions in a streamlined democratic state. The time-honored distinction between executive and legislative functions should be boldly discarded.<sup>10</sup> In a technological age enactment of laws is clearly a function of government, as much as the execution of them. Government consists of deciding on a policy to be followed, seeing that it is translated into law, and applying and administering the law. This, at least, is the essence of the British parliamentary system, under which the government is responsible for the legislation to be enacted and not just the robot of the parliamentary majority. If the parliament were relieved from the burden of routine legislation it could concentrate on its principal function, the political control of the government.<sup>11</sup>

But the delegation of powers is only half of the solution. A strong executive is not the master of parliament but its servant—as master, it would be authoritarian. It must remain amenable to the parliamentary majority at all times. The technical device for the permanent control by the parliament of the executive is the vote of confidence and, eventually, the dissolution of parliament, which would call upon the sovereign electorate to decide conflicts between the government and the parliamentary majority. Any new constitution should define the use of the vote of confidence (which must be used with care if its edge is to be kept sharp), and the right of the government to dissolve parliament (another weapon to be used only as a last resort, and not to be dulled by excessive use).<sup>12</sup>

The ultimate result of such streamlined democratic government will be that political leadership can function properly. A constitution which discourages leadership and responsibility will find little favor in the postwar era. The arrangement has to steer clear of the Scylla of the impotent, and the Charybdis

of the uncontrolled, government. The government must govern, and the parliament must control the government.

## (2) *Avoidance of Deadlocks*

The second crucial issue is avoidance of constitutional deadlocks. The future constitutions should provide the means for a clear-cut decision on any deadlock into which executive, legislature, and judiciary may fall with one another. A well constructed constitution must offer a solution which indicates in the case of conflicts between them which is to prevail over the others. The problem is different from the requisite of a strong executive because the deadlock may arise, for example, from a controversy among the two houses of parliament.<sup>13</sup>

The science of comparative government has wholly neglected an issue which, on close inspection, is behind every constitutional crisis and underlies most political revolutions in our time. We must distinguish between a political crisis, on the one hand, and a constitutional crisis, on the other. A political crisis occurs when different power groups dispute among themselves the control and the use of the existing organs of the state. This situation is quite ordinary and is the essence of political dynamics. But a constitutional crisis is due to a defect or a gap in the constitution, for which no normal means of solution are available; and this invites either illegality or revolution.

The conflict, seemingly inseparable from the democratic state, is due historically to the mechanistic conception of the eighteenth century, when written constitutions first came into vogue. Their framers, living in the intellectual climate of their age, believed that human life, like nature, should be governed by the immutable laws of physics. The most conspicuous fruition of political mechanics is the check-and-balance system inserted into the separation of powers. Deadlocks do not occur under dictatorial government. Napoleon, the supreme realist, with his will controlled all the constituted powers, and saw to it that there was no conflict among them. Nor could the problem arise under the constitutional monarchy of the nine-

teenth century, because here the crown by virtue of its prerogative could prevail at any time over parliament, cabinet, and people. But political democracy is constantly exposed to insoluble deadlocks among the organs of the state, each claiming to express the popular will. The framers of democratic constitutions, in their eagerness to checkmate a potentially arbitrary abuse of political power by any one constituted organ, created a cogwheel system of government which became wholly unworkable, with the result that authoritarian power cliques or dictators usurped control just to make the wheels of government turn again. The issue could be followed through in the history of practically all constitutional states since 1918.<sup>14</sup>

The lesson to be drawn from the almost universal occurrence of political deadlocks after 1918 is that, in the new constitutions, the clear-cut solution for conflicts between constituted powers must be found of making the people as electorate the ultimate arbiter.

### (3) *Emergency Powers and the State of Necessity*

Ordinarily the right of the government to rule in a national emergency by extraordinary methods, variously called martial law, state of siege, or state of necessity,<sup>15</sup> is considered as a natural attribute. It may take different forms, from temporary restrictions imposed on certain political districts to wholesale suspension of the constitution or of certain fundamental rights under it. The emergency powers have served, in the past, as the chief means of transforming a constitutional democracy into an authoritarian or dictatorial state, as demonstrated by the famous Article 48 of the Weimar constitution. It is of cardinal importance that the future constitutions place the use of emergency powers by the executive under effective parliamentary and judicial control, and that the executive and its agents be held strictly accountable for their use.<sup>16</sup> If the case in which emergency powers may be used, and the manner of their use, both are brought under the rule of law, it will become next to impossible for a democratic state "legally," and in that

way surreptitiously, to slide into an authoritarian or dictatorial regime.

Constitutions are more than the skill of the technicians who draft them, and the wisdom of the arrangements they embody. Their serviceability and success are correlative to the spirit of the men who handle them, and the spirit of the people who have to live by them. The most difficult task of political reconstruction is the re-creating of the will to obey the law which the lawlessness of the totalitarian interregnum has destroyed. One can only hope that Europe will recover sooner from revolution, attaining political stability, than pessimists were inclined to expect.



*Part Five*

THE DEMOCRATIC IMPERATIVE OF  
POLITICAL RECONSTRUCTION



## CHAPTER I

### *Political Tutelage*

#### THE THESIS IN RETROSPECT

One of those hapless men who are condemned to earn their daily bread by reviewing—and presumably reading—other people's books, some time ago made the sagacious remark<sup>1</sup> that writers about the postwar situation belong to either one of two classes: the utopians, who speculate on what ought to be done; the pessimists, who warn that it cannot be done. That assayer of literature might wonder how to classify a book which preaches: What has been done in the past must not be repeated in the future. In its defense, it can be said that Providence wisely denies to human beings the gift of clairvoyance; all they can do is to present historical experiences as object lessons for the living generation of statesmen or men who by accident have been placed in a position where they must act as if they were statesmen.

Thus far our task has been to develop and, as far as possible, prove a definite thesis, by historical retrospection and political introspection. Briefly stated, the thesis amounts to this:

The traditional maxim of the law of nations and the practice in international relations that every people has an inalienable right to internal self-determination is restated in Article 3 of the Atlantic Charter, claiming for every people the right "to choose the form of government under which it will live"; therefore, the right to intervene in other peoples' government is denied to the members of the international community

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<sup>1</sup> See pp. 483-484 for footnotes to this chapter.

individually and collectively. The proposals of Dumbarton Oaks and the Charter of San Francisco toed the line.\* As long as this dogma remains in force, there cannot be an abiding peace and a stable world order. The form of internal government determines the conduct of foreign relations; and political democracy and autocracy, as forms of government, are so diametrically opposed to each other that their coexistence within one and the same frame of international organization is impossible. On these premises it was contended that political reconstruction, in the interest of the peoples themselves no less than that of the international order, should be focused on political democracy and that, consequently, autocracy should be declared a nonpermissible choice as form of government.

#### THE THESIS PROJECTED INTO THE FUTURE

Granted the correctness of the thesis, how can it be made effective? As was to be expected, the desire for internal self-determination is rebounding with a vengeance from under Hitler's "New Order." Are the liberated peoples sufficiently wise to turn voluntarily to political democracy? And can any people which does not, be compelled from without to adopt it? How can autocracy as a form of government be prevented in the future?

The answers to these crucial questions are the test of the thesis. The solution is intimately related to the definition of aggression, which the Atlantic Charter (Article 8) confines to acts "*outside the frontiers*" of a state. What about aggression of aggressor nations *within their frontiers*, aggression by a government against the liberties of its people and against the people's right to prevent war by changing the government? Propaganda against freedom is as deadly as poison gas, denial of freedom to the people is as devastating as the rocket bomb. Dumbarton Oaks remained silent on the issue. At San Francisco some of the smaller nations raised it, but could not get it accepted. Both adhere to the orthodox concept of unlimited and illimitable international self-determination.

\* See *infra*, pp. 380 ff.

The incorrigible optimists of political *laissez faire* trust in God and let nature take its course, which leads straight to the Third World War. Positive action is required; but such action must be within the boundaries of the politically possible and reasonable. It is the limit of absurdity to expect that henceforward, whenever a nondemocratic government is set up or is about to be set up in a state, the Security Council (or the Big Four, or the Anglo-American-Russian Triplice, or whatever group holds power over the world) will send the offending state a stiff note threatening, unless democracy is restored within twenty-four hours, to send against it bomber squadrons of the international security organization. Even if force should be feasible, it is likely that the people would suffer, while the offending government escaped. Nor is it feasible, at the time of a change of political power in an internal upheaval, to determine objectively whether it constitutes a transition from democracy to autocracy. There is nothing more stretchable than a constitution; nothing more elusive than the location of political power in a state.

We have to keep our feet on the ground, and we must not try to walk in the clouds. Outright coercion to establish or to maintain political democracy is clearly utopian and of no avail. Aside from all other objections it presupposes the existence and effective working of an international or world organization, flying bravely the flag of universal democracy and having the will and the power to enforce it. No, the issue must be approached more cautiously, more gradually. In keeping with the preceding sections of this book—which, it is hoped, were not too speculative—proposals of a more moderate and constructive nature and more in line with political realities are submitted here.

At this point the author feels compelled to make a statement for the record. He is fully aware that history, impervious to abstract premises and conclusions, has supinely overridden some of his suggestions, and that to many of his readers they will appear anachronistic. None the less the fundamental thesis of this book justifies and requires that an account be given of

how the thesis should have been translated into the reality of the postwar situation. The reader, then, may judge for himself whether the policies actually undertaken are, or are not, more conducive to a lasting peace than the author's blueprint.

#### SHORT-RANGE AND LONG-RANGE PROPOSALS

The proposals offered are of two kinds. Short-range proposals pertain to the transitional period which began with the conclusion of hostilities. They are intended to remove tangible obstacles to the establishment of political democracy in certain states, and to set it going. In their entirety they may be spoken of as the system of political tutelage. It is the sum total of restrictions by the victorious states on the constituent power of a certain nation and on the organization and conduct of its government. But the term "short range" is relative only. Political tutelage may last for a considerable time. •

Long-range proposals are projected into a more distant future. They are intended to keep political democracy going where it exists, and to prevent its conversion into authoritarian government. They pivot upon the insertion into the bill of rights of every defeated nation and, if possible, of every nation, of a new *political individual freedom*; namely, *the right to participate in the government of the state through democratic elections*. If applied and observed, this new political right would gear political democracy to the continuous cooperation of the people themselves and would make them custodians of their own freedom.

Both sets of proposals are predicated on action by the victorious states no less than by the defeated nations; they are interrelated and mutually interdependent. But while the short-range proposals are admittedly of an emergency nature, the long-range proposals envision a reasonably stable and effective international organization. Another vital difference that should not be ignored is that the short-range proposals of political tutelage refer only to nations that need it, while long-range proposals affect equally all nations on a certain level of polit-

ical civilization. Short-range measures *must* be undertaken; long-range measures *should* be undertaken.

#### THE AREA OF POLITICAL TUTELAGE

While it is generally realized that discrimination at the expense of the defeated nations is the prize of victory and the penalty of defeat, the actual situation in which the majority of the vanquished states found themselves at the beginning of the reconstruction period is definitely at variance with the maxim that defeat produces inequality of international status.

All Axis states and all their satellites are the legitimate objective of political tutelage. This applies primarily to Germany or, if political developments bring her dissolution, her subdivisions. Germany's fate should be shared by Austria, regardless of the sympathies stirred by memories of Viennese *Gemütlichkeit* or by officious "free movements," and in spite of the promise of future independence in the Moscow declaration. The Austrians may have been raped by the Nazis; but obviously they enjoyed it, and consent of the partner of cohabitation technically excludes rape. Italy of right belongs to the same class as Germany and Austria, and should have been treated accordingly. However, events in Italy seemingly have taken a different course. The Italians, within less than a year of the beginning of the occupation, convinced themselves and the world that they should be absolved from the guilt of Fascism. There is no longer any inclination to hold the Italian people responsible for Italian Fascism; and their self-vindication has progressed at a pace truly amazing to those who observed how soaked with Fascism the ruling classes and the corrupt bourgeoisie were for the twenty years in which Fascism was a profitable enterprise. But, long before the partisans made their contribution to the overthrow of Nazism and Fascism on their own soil, the Italians had conducted themselves as one of the United Nations, prevented by unlucky circumstances alone from being on the right side from the start. The premature redemption of the Italians is a fact which has to be accepted.

Hungary, Bulgaria, and Rumania also have been such suspiciously submissive brothers under the totalitarian skin that their degradation to political tutelage is warranted until they give proof of their moral and political rehabilitation—even though Rumania and Bulgaria, long after the deadline, successfully climbed on to the bandwagon. To treat the Rumanians as one of the United Nations is a scandal of the first magnitude. However, *ex post facto* speculation about these Balkan states is beside the point. The Soviets have taken matters into their own capable hands. They decide whether to accept "friendly governments" or to resort to more incisive political controls. To all intents and purposes these states, together with Poland, are under the political tutelage of Russia. The test should not be just the side of the fence on which a state found itself when the guns ceased firing, but its entire political record in the period between the world wars. Finland has testified so convincingly to her deep-rooted democratic disposition, by warding off successfully communism as well as fascism, that not even the two wars she had to fight should detract a jot from her being treated as a democratic state in the future. Whether Japan, after her defeat by the Western powers, should be or can be subjected to political tutelage, is a problem on which this writer is not competent to pass.

Europe's chances of stabilization would be greater if some other states could be induced to accept a modified kind of political tutelage, at least until they regain their equilibrium and find their democratic bearings. This class would include Greece, Yugoslavia, Albania, and the new states in the Near East. Desirable as it is that these nations voluntarily accept political guidance from the Western powers in installing democratic regimes, it is unlikely that they will do so. As members of the victorious group they claim, and receive, recognition as sovereign states with the full and unabridged right of self-rule. This may be regrettable; but it is evidently unavoidable. One could not first enlist the cooperation of the people and the resistance groups in a country and then, after liberation, treat it, even in its own interest, as a second-class state just

because it had had authoritarian governments and corrupt ruling classes in the past. These nations should have been required to prove their willingness to set up a democratic house and stay in it, before self-rule was returned to them. At least the establishment of provisional governments and the holding of elections under Allied control so definitely envisaged at Yalta, should have been insisted on instead of transferring civilian administration to national governments upon liberation, whether legitimate on paper or self-appointed, without requiring a measurable popular mandate. Once more, principle was sacrificed to opportunism, and thus the very purpose of democratic stabilization is in jeopardy.

Of the western and northern European states—Belgium, Holland, Luxembourg, Norway, and Denmark—none deserved, and none agreed to, anything less than fullest internal self-determination. They had amply demonstrated their capacity for democratic government and their devotion to it; none of them had weakened during the occupation; they could be trusted to put their houses in order without pressure from outside. These reasons justified granting them civilian administration as soon as military considerations permitted. Czechoslovakia belongs to the same category; her democratic record down to 1939 was among the best in Europe. However, the Czechs would be well advised to accept international guidance when settling their accounts with the dissident Slovaks and the Sudeten Germans.

The case of France by now is likewise removed from speculation. The French, forever sensitive to the slightest encroachment on their sovereignty, and more sensitive after liberation because of the humiliation of the preceding defeat, did not countenance any foreign interference or even advice on how to reestablish their state. The De Gaulle regime both in Algiers and in metropolitan France since the liberation has revealed an authoritarian tinge which evoked misgivings in orthodox democrats at home and abroad. Will the transition period afford the French people the opportunity of choosing their form of government without violent convulsions? This

question may seem too pessimistic after the surprising ease with which France since the liberation has assumed the heavy burden of internal reconstruction. But the student of French political history and psychology is not surprised that a mature and realistic people has found its equilibrium without violent convulsions, perhaps because a profoundly bourgeois nation feels that "plus ça change, plus c'est la même chose." But he would be ill advised to underestimate the revolutionary potentialities, particularly in the South, of the masses trained in the technique and the ideals of the Resistance and increasingly receptive to Communist indoctrination. French postrevolutionary history, which reflects the continual struggle between *les deux Frances*, suggests that the present political truce between the authoritarian-minded privileged classes and the masses impatiently demanding social justice may be short-lived. If France should slide back into the outworn political grooves of the prewar politics dissatisfaction might become explosive. Remembering what French political genius contributed to the birth and the triumph of the democratic idea, one would wish to forget the putrescence of French politics before the collapse. But Pétainism and collaboration with the German "New Order" were more than casual developments from an unexpected military defeat. The moral purification of the intellectuals and the regeneration of the democratic faith among the masses are perhaps the most vital desiderata of European reconstruction, from the over-all viewpoint even more important than what will happen with and in Germany. The old saying, "When Paris is quiet, Europe is quiet," has lost nothing of its reality.

The area of political tutelage, thus, is necessarily confined to the Axis states and those of their satellites which are justly suspected, from past performance, of inability to govern themselves as political democracies.

#### HOW POLITICAL TUTELAGE IS TO BE IMPOSED

Political tutelage should be imposed on the defeated nations—if not by the armistice agreements as corollary of unconditional surrender—at least in the peace treaties to be



concluded. The conditions should not be specified in detail but circumscribed in the most general terms, which will permit adjustment to situations as they arise. It would be sufficient to stipulate that the people and government of State X accept such political control over their internal affairs as the United Nations or their duly established agencies shall find advisable for political reconstruction. But it should be made clear at the earliest opportunity that the political restraints to be applied are no less in the interest of the nation itself and its speedy rehabilitation than in the interest of international peace and stability.

No time limit should be set in advance for the period of political tutelage. It must last until the nation in question has learned to conduct itself as a political democracy. Loosening of controls must be guided by gradualism, extended as a reward for the cooperation of the people. But political tutelage can be lifted altogether only if and when the forces of democratic reconstruction within the nation have become strong enough to permit the definite conclusion that internal self-determination will not be abused in the future.

What evidence is available as to compliance with this postulate in practice? The terms of the Italian armistice, not yet made public, are said to include the right of the Allies to control the establishment and conduct of the Italian government. The armistice agreement between the three great powers and Bulgaria, concluded October 28, 1944, in Moscow,<sup>2</sup> contains various limitations of internal self-determination, under supervision by the Allied Control Commission, such as: obligation of the Bulgarian government to dissolve all pro-Hitler and other fascist organizations and not to tolerate them in the future (Article VII); supervision of press, theater, film, mails, radio, and other means of telecommunication by the Allied (Soviet) High Command (Article VIII); restoration of property to the United Nations and their nationals (Article IX).

The armistice agreement between the three great powers and Hungary, concluded January 20, 1945, in Moscow,<sup>3</sup> goes even further in restricting even a defeated state's right to regu-

late its internal affairs. In addition to restrictions analogous to those imposed upon Bulgaria (Articles XV, XVI, XIII) it stipulates repeal of all discriminatory legislation and disabilities on racial or religious grounds, with special reference to Jews and stateless persons (Article V); requests full cooperation of the Hungarian government in the apprehension and trial of persons accused of war crimes (Article XIV); and places the restored Hungarian civilian administration, "in the interest of the reestablishment of peace and security," under the instructions and orders of the Allied (Soviet) High Command or the Allied Control Commission (Articles XVII and XVIII).

#### GERMANY AND POLITICAL TUTELAGE

This book, not dealing with the German problem as such, will refrain from discussing it except where it touches directly the main thesis submitted here. The Crimea Conference agreed to set up a joint military rule over Germany. The regime in force since the unconditional surrender of her generals to the Allied commanders and governments (May 7, 1945) has approximated the proposal of political tutelage—envisaged by this writer long before such plans were made public—even though the two are not wholly identical. Its establishment is not based on any abstract premises. An eminently practical measure, it is dictated by the sheer necessity to crush Nazism, to destroy German militarism, to break the German war potential, to secure European reconstruction without German interference, and, thus, to prepare for peace in our time. The purposes of the military regime are primarily military; but, projected into a more distant future, they are also political. The border line between the two aims has been fluid since the narrower concept of military occupation and government <sup>4</sup>—that is, to serve for the security of the occupying forces—became insufficient.

The outline of the regime as planned at this writing <sup>5</sup> is briefly as follows: Conquered Germany is divided, for the purposes of military occupation and administration, into four parts, under American, British, French, and Russian jurisdiction respectively. The Allied Control Commission, headed by

a general of each of the occupying powers, is the only central authority in and over Germany. For an indefinite period there is to be no indigenous German government. Whether it will be possible to treat Germany, occupied by four different powers, as an economic and political entity, remains to be seen. The western powers are in agreement with the Soviets to eradicate Nazism and militarism in Germany and make the Germans responsible for the damage they have done. But beyond this the ultimate aims of political reconstruction and the methods to be applied for their achievement have not been publicly revealed and may, for both sides, depend on circumstances.

The fact that a state, long a great power and only yesterday close to world mastery, is placed under military control for an indefinite period and without any bilateral basis implying its consent is without precedent in international law. It is accepted by public opinion with rare unanimity: a strong indication that the idea of internal self-determination—conceded in previous times even to the defeated enemy after *debellatio*—has lost its magic. We are divesting ourselves of the antiquated concept that a state, whatever its degree of internal consolidation, must have a government of its own. Territories and the people living in them may as well be administered instead of being governed, until the political forces can be properly assessed and until they have developed in conformity with the interests of other states.

There was no German government when the Third Reich disintegrated; and, if the Allies are well advised, there should be none for a long time to come. German internal self-determination or sovereignty must remain confiscated by the victorious nations and, to use Pertinax's words,<sup>8</sup> be returned only in successive installments of which the judgment they pass upon the new Germany taking shape under their close observation is sure to determine the importance. The situation in Italy should constitute a warning and not a precedent. It was a grave error to allow an Italian government to rule without the semblance of a popular mandate and under the tacit assumption of the continuation of the monarchy; it should have

been postponed at least until northern Italy was liberated and the people could be consulted. For the Italian solution military necessity has been adduced. This cannot be appraised without full knowledge of the facts. It may also be true that the Italian people were less affected than the Germans by their brand of totalitarianism. Fascism, over a much longer life, had become a protective coloration and a social veneer and was a much less consistent method of political control than its German counterpart.

It is likely that in Germany, sooner or later, indigenous "democratic" groups will come forward with a claim that they constitute a government. We can be sure that enough political adventurers *intra muros et extra*—fossilized politicians of the Weimar republic, Catilinarian characters thrown up by the upheaval, turncoat industrialists with "international" connections, or even political opponents of the Nazi regime emerging from the purgatory of the concentration camp—will offer themselves as candidates for a "democratic" regime, willing to assume responsibility under the protection of the Allied bayonets. But this would be far short of a reasonable guarantee of stability or permanency, wholly aside from the questions: On what support among the mentally sick German people could such men count? and How could the public opinion allegedly behind them be rationally expressed?

The Allies should resist the temptation of a premature enlistment of Germans willing to share in their political reconstruction. Be it repeated: No German government, and no government of any subdivision of prewar Germany, should be tolerated for a long time to come. Rather, politically trustworthy Germans should be permitted to build up, on the municipal, local or regional level, nuclei of purely administrative character whose effectiveness would be enhanced by their complete abstention from governmental responsibility. Whatever technical or administrative agencies may prove necessary—and they cannot be dispensed with in the complicated situation of battered Germany—should be strictly provisional and intermediate and under the closest supervision and the

constant control of the Allied occupation authorities. Only at a very much later date will it be determinable whether German agencies of a political nature can be admitted, and whether they can count on the allegiance of the people. Any effort to precipitate the restoration of self-rule within Germany (or some of her satellites for that matter) would be calamitous to European stabilization. On the other hand, political sanitation and rehabilitation could be measurably accelerated if, by a skillfully conducted educational campaign, the people were made to realize that the rigidity of political controls and their eventual relaxation depend on their own introspection and authenticity of moral conversion.

It is fully realized that this task of political tutelage within the frame of military or, at a later date, civilian occupation and administration will tax the ingenuity and the patience of the occupying powers to the limit and far beyond present expectations, both in time and in the amount of qualified administrative personnel required. At the same time the success or failure of the gigantic undertaking constitutes the acid test of the appeal the competing ideologies of the occupying powers will ultimately have. But such problems are beyond the scope of this book.

Fortunately there was no need for a German government—even if there had been one in existence—to accept unconditional surrender. Unconditional surrender is not an armistice on a contractual basis—as between Germany and Vichy France in 1940—but a military-technical fact. The signature of any political government—Nazi, army, democratic, or what not—would be of no value at all. That no “democratic” successor of the defeated regime in Germany was induced or compelled to sign, as in 1918, and that the military commanders themselves had to submit after defeat on the battlefields, would seem to make unlikely that nationalism once more revived would accuse a democratic regime of having bowed to unconditional surrender. Of course the possibility remains that a democratic government may later try to repudiate the conse-

quences of unconditional surrender with the claim that it was not responsible for the collapse.

However, sooner or later—and better too late than too soon—the problem of the final peace treaties will arise, and a partner for countersignature must be sought, who can be no other than a responsible German government. For this new situation no advance solution can be offered except to repeat that, in the interest of political reconstruction, a single assembly should under no circumstances be charged both with accepting the peace and with writing the new constitution.

#### MACHINERY AND TECHNIQUES OF POLITICAL TUTELAGE

The present situation in Germany would suggest that political tutelage and military rule are not only coincident in time but identical in substance. However, the two, though overlapping, necessarily differ in aims and techniques. It is submitted here that, while military rule and occupation are instruments of political tutelage, they should not in the long run become substitutes for it. True, occupation has more than strictly military objectives if it is used not only to maintain public order and disarmament, but to enforce immediate economic and social measures. In performing these tasks the military occupation authorities cannot refrain from making political decisions. It should be understood that the primary intent of such political actions as they take is to maintain order in the occupied territory and not to prepare the ground for democratic reconstruction. It is further submitted that military occupation is unsuited in its personnel and structure to political tutelage. In order to accomplish democratic reconstruction under political tutelage the military rule should be replaced at the proper time by a predominantly nonmilitary administration of the territory under occupation.

This statement is no adverse reflection on the ability or competence of the military authorities officiating at the present time in Germany and elsewhere. But it is in line with the historical evidence that the training, experience, and outlook of

military men makes them, as a rule, less suited for democratic reconstruction than civilian personalities of comparable technical ability.

It is on these premises—admittedly of a speculative nature at the present juncture—that an outline is now presented of the machinery of political tutelage, as distinguished from military rule proper. It is only a rough blueprint to indicate the general character of the proposal; and it is applicable not only to Germany but to other states which require and accept the institution of political tutelage.

(a) *The Inter-Allied Political Control Commission*

COMPOSITION. It is proposed to create an Inter-Allied (or United Nations) Political Control Commission (IPCC) as the central agency to apply and administer it. Its official seat should be London, as the capital most conveniently located. Represented on the commission should be Great Britain, the United States, France, Russia, and those states bordering on a territory to be placed under political tutelage, with the exclusion of such states as are themselves thereunder. Other states belonging to the United Nations would not be excluded from representation on the commission, and even neutral countries of democratic structure (Switzerland, Sweden) may be added if they wish to participate. There is not the least point in admitting representatives of all United Nations as ex-officio members. What interest would Guatemala have in deciding problems in an area geographically so remote as Austria? For that matter, what business had the Japanese in Memel? The delegates on the IPCC act under the instructions of their respective governments. Its procedure should be elastic, allowing decisions by compromise. It is well realized that the condition for successful operation of the IPCC is continued unity of purpose among the Western powers and the Soviets. If they should fall apart the entire system of European reconstruction would fall. The Russians may even be inclined to trade participation in the jurisdiction of the IPCC over territories outside their sphere of influence against a share of the Western powers in

the political control of regions now under their exclusive supervision.

**PERSONNEL.** In the designation of members of the commission it should be borne in mind that political reconstruction presents problems of a novel kind and requires a new type of personnel. Accomplishments of a military or diplomatic nature are decidedly less of a qualification than practical political experience and knowledge of European affairs. The problems with which the members will have to deal are eminently practical, requiring sound political judgment and, above all, a genuine and unshakable democratic faith—which is not an authentic product of the diplomatic career service. Best suited would be experienced politicians, men who have handled pressure groups and public opinion, and understand the give-and-take of party politics. A former Prime Minister of a British Dominion, to illustrate the type, in most instances would fill the specifications. In technical problems the commissioners would have the help of their staffs, experts in the constitutional law, history, political and social psychology of each nation placed under political tutelage.

**FUNCTIONS.** The IPCC may be described as the steering committee of European political reconstruction. It would develop and execute the grand strategy of guiding certain nations through political tutelage. It would act as the supreme political agency in all controversial problems referred to it by the Constitutional Commissioners appointed to serve in the different countries. It would coordinate the measures of political tutelage in the different states with the frequently related work of other Inter-Allied Commissions on financial, economic, military, social matters, all of which bear directly on the issues of political tutelage proper.

(b) *The Constitutional Commissioner* <sup>7</sup>

**GENERAL FUNCTIONS.** In a given country under political tutelage the Constitutional Commissioner is the delegate of the IPCC appointed by, and subordinated to, the latter. He has to apply the general policy to the country in which he functions.



His position is difficult to define in terms of older political institutions. Inadequate parallels, pointing the direction rather than serving as actual precedents, are the financial and economic advisers appointed by Britain and France to the governments of Greece, Egypt, Iraq, Syria,<sup>8</sup> the financial agents of the League of Nations in Austria and Hungary, and the High Commissioner of the League of Nations in Danzig.\* Another illustration—equally inadequate though more pertinent—is the committee of Allied ministers established in Paris after 1815 to watch over the restored monarchy.<sup>9</sup> But the Constitutional Commissioner has functions much wider, powers much more extensive than any of these had, in that he not only advises—he decides. He is the inter-Allied authority on the spot to set political reconstruction in motion and keep it going, to steer political dynamics, as the official pilot, into democratic and constitutional channels. His manifold functions are so dependent on the unforeseeable course of internal reconstruction that they cannot be comprehensively described here. His primary task is to guide such local or regional authorities as may exist or be established, and to relay information to the IPCC. In a territory without a provisional government he takes the place of a government, cooperating closely with the military occupation authorities. When a provisional government is to be formed he has to evaluate its ability to command the allegiance of the people, the political character of its members, its program and democratic intentions. It must be taken for granted that a state under political tutelage will not be permitted to set up a provisional government or any *de facto* authority without the assent of the IPCC. Assent will be withdrawn from the provisional government if it acts in a way injurious to the democratic aims of political reconstruction. He will advise or pass on all matters of political importance, including: allowance or prohibition of political parties as they emerge in the political trend; restriction, or loosening of restriction, on the exercise of civil liberties by the people under tutelage, particularly through press and radio, association and

\* See *supra*, pp. 61 ff.

assembly; the use by the provisional government of its emergency powers; enactment of measures which, while adequate for the defense of the incipient democratic order, will not unduly oppress legitimate opposition to the provisional government or the elected national assembly; operation of the local courts in accordance with democratic principles; purge of the civil service and the administration; decontamination of the existing statutes. In practice he would be as much the governing authority under the IPCC as the official and obvious point of contact or liaison between the provisional government and the IPCC; the local authorities, through his advice and consent, would be strengthened to coordinate themselves with the policies laid down by the IPCC.

**SUPERVISION OF THE CONSTITUTION-MAKING PROCESS.** The Constitutional Commissioner's functions will have particular relevance at the next stage, when the country under tutelage proceeds to determine its form of government by electing a national assembly charged with drafting a new constitution. He will have to certify to the IPCC that the nation has reached a degree of democratic development that permits elections to reflect the national will. These must be postponed until economic conditions are sufficiently stabilized to minimize the danger of extremist parties thriving on discontent. Once the IPCC has resolved, upon his recommendation, to permit an election, it is his duty, together with the military occupation authorities or, eventually, an international police, to guarantee the fairness of the campaign and the honesty of the election. He has to pass on all issues related to the purging of antidemocratic elements from political life. He constitutes the supreme arbiter on all technical matters connected with the election.

A people subjected to political tutelage cannot be permitted to write for itself whatever constitution it pleases. If the security of the other nations requires that Germany be denied the right to make tanks, airplanes, and rocket-bomb installations, it seems illogical, at least, to allow her to enact a constitution opening the way to an authoritarian government which, by fair means and foul, may emotionalize the people

for revenge or for disturbance of the international order. Consequently, no state under political tutelage should be permitted to adopt a constitution without specific approval by the Constitutional Commissioner and the IPCC. An ounce of precaution is worth a ton of regret. It is easier and less costly to keep the seeds of potential authoritarian government out of a constitution in the writing than to resist authoritarianism that has developed into full bloom under an enacted constitution which may claim legitimacy through adoption by the people.

The proper agency for what may be called constitutional control is the Constitutional Commissioner. In practice he should combine effective supervision of the constitution making with submission of the completed instrument to the IPCC for approval before it enters into force. For the first purpose the Constitutional Commissioner should have full access to all documents relating to the constitution under advisement. His appointees should be free to attend all meetings of the national assembly and its subcommittees, without participating in debates and votes. At this stage he will tender advice and suggestions if he considers that the general form of the planned constitution, or specific details, will impede the establishment of political democracy, or its future success. He will carefully avoid revealing preference for any particular pattern of democratic organization; but he will see that no provisions are included which will lend themselves to an authoritarian perversion of the constitutional order. For example, he will object to a provision granting emergency powers to the government without adequate parliamentary and judicial controls, or to an electoral system conflicting with the requirements of universal and equal suffrage, or to arrangements permitting the reconstruction of parties swayed by the *Führer* principle. The more impartial and expert his advice is, the greater his usefulness as a catalyst of conflicting political trends and his prestige as *amicus populi*; in critical issues his good services will lead to acceptable compromise solutions or to the breaking of deadlocks between intransigent political parties. Should no

agreement be reached on issues he considers vital to the development of a sound democratic system, he will refer them to the IPCC for final decision. His position will be *mutatis mutandis*, similar to that of the governor general of a British dominion, who, prior to the Statute of Westminster, had the right to reserve dominion legislation for the royal assent—that is, for approval by the British government and parliament.<sup>10</sup> The ruling of the IPCC, advised of the viewpoints of the provisional government and the national assembly as well as of that of the Constitutional Commissioner, will be final.

The draft of the constitution, when completed by the national assembly, should be submitted to the IPCC for study and approval, together with the comments and recommendations of the Constitutional Commissioner. The final adoption of the draft by the national assembly and its eventual ratification by the people must be postponed until any objections by the IPCC have been met and this central agency for political reconstruction has given the green light. The proposal to submit the constitution to the IPCC for confirmation has, as far as can be seen, no immediate precedent except in the analogous situation in Danzig in 1919. But the requirement in some federal states of maintenance of minimum standards of constitutional democracy by member states, with supervision by the federal authorities, is a significant parallel.\*

#### INVISIBLE CONTROL

The activities of the Constitutional Commissioner as political adviser and supervisor should by no means cease after the democratic constitution has been adopted and begun to operate normally. None of the nations to be placed under political tutelage can be trusted without a prolonged probation during which it demonstrates that it can live up to a democratic constitution, without relapse, in time of crisis, into authoritarian methods. Political tutelage, therefore, should be continued until the IPCC, advised by the Constitutional Commissioner, finds that the nation has become accustomed to the climate of polit-

\* See *supra*, pp. 106 ff.

ical democracy and has passed beyond the danger of reversion to authoritarianism.

The probational phase may last years, a decade, and longer; but, once a nation starts to move under its own democratic steam, the controls can be relaxed until its political tutelage is nominal. Political tutelage, having passed from the operational to the supervisory stage, may finally reach the point where the Constitutional Commissioner can be reduced to the role of an observer. Such tutelage will in time become invisible and in the end will be abolished.

Military occupation does not necessarily coincide in time with the maintenance of political tutelage. It may even be assumed that, in certain countries, perhaps for strategic reasons, the occupation will have to be continued after complete internal self-rule has been granted. In other cases the tutelage will outlast military occupation proper. Against the argument that it would become ineffective without military occupation stands the fact that political tutelage may be reestablished at any time either by the United Nations or by the executive powers of the international security organization.

#### PERSONALITY AND STAFF OF THE CONSTITUTIONAL COMMISSIONER

The functions of the Constitutional Commissioner are so novel, their effective performance so difficult, that only an exceptional personality can qualify for the office. He must be, in the first place, fully conversant with the language and the cultural and political system of the country for which he serves. Likewise he should have practical experience in democratic procedures and institutions in his own country. A man of tact and firmness, of experience and incorruptible democratic convictions, he has to handle friends and enemies, hobnobbing turncoats and unbending nationalist fanatics. A man of the world and of affairs, he must be the genuine friend of the nation which he has to assist in setting up democratic machinery and in maintaining it in working order.

Can such intellectual and moral supermen be found? Their

responsibility is formidable, but is one to tempt the most ambitious.

The Constitutional Commissioner can function only with the help of a technical staff of qualified specialists; and they should be chosen from all countries. Essential on the staff are men thoroughly familiar with the political and social conditions of the country under tutelage. Such familiarity may be found among refugees from that country who have acquired democratic experience in their lands of adoption. With tact and a gift for self-effacement they could make a genuine contribution. But, above all, the Constitutional Commissioner needs the help of nationals of the country itself, invited to join the staff. Without the cooperation of the indigenous democratic elements, it will be hard for him to find his way through the labyrinth of political trends and movements, to appraise personalities, to gauge public opinion. The more readily such cooperation is granted and accepted, the easier it will be for him to convince the majority of the nation under political tutelage of his real purpose; namely, to help it build democracy from within.

#### POLITICAL TUTELAGE: MENTORSHIP OR SUPERGOVERNMENT?

To the question whether the scheme implies political mentorship or a supergovernment, the answer is: Both. Which of the two aspects will be more marked in practice, cannot be determined in advance. The unknown  $x$  in the equation of political reconstruction is the mental attitude, the residual moral fiber, and the will to political regeneration of the people itself after its release from totalitarian dominance. There are so many irrational and unpredictable factors that the ultimate success of political tutelage cannot be foreseen. It is not even possible to forecast the attitude of the nation itself. In one country political tutelage may encounter bitter resentment and violent opposition, and defeat its purpose by becoming the focus of a nationalist revival. In another country it may be accepted as most sensible and advantageous. It is, and it will remain, a political experiment. I remember vividly a conversa-

tion in 1920 with the late Professor Robert Piloty, a man of wide culture and profound democratic convictions, who was one of the official draftsmen of the then brand-new Bavarian constitution of 1919, a paragon of political democracy; Piloty commented in my presence that the framers of the constitution had committed a serious error. Asked facetiously which of many errors he had in mind, he answered: "We should have placed Bavaria for twenty years under a British governor." His words were prophetic. How much misery the Allies could have spared Germany and the world at large if after 1919 they had extended the Germans more assistance in economic reconstruction, and less generosity in running their internal affairs as they pleased. Instead the Allies permitted, under the protection of the Weimar constitution with its exaggerated concepts of political freedom, the rise of the nationalist movements, which advertised their intentions by the systematic assassination of democratic leaders, by the glorified sabotage of the peace treaty, by the obstruction of incipient democratic government, with the conniving reactionary courts and recalcitrant officials. If at that time, there had been imposed upon Germany a political Dawes or Young Plan to strengthen the democratic forces and keep the nationalist resurrection under control, the majority of the German people would have welcomed it. The Allies should have insisted on purging the civil service, the army, the bench, and the bar of antidemocratic elements; they should have insisted that the republic adopt stringent measures to defend the democratic order against its internal enemies; they should have insisted that foreign loans be withheld from use for secret rearmament and the rebuilding of the war potential. But internal self-determination was sacrosanct, and other peoples' governments were "none of our business." And it might also be recalled that the financial tutelage imposed upon Austria in connection with the League of Nations loans was popular in the country, which well realized that it could not pull itself out of the economic swamp by its own bootstraps, in the manner of the legendary Munchausen.

**Much of the success or failure of political tutelage will de-**

pend on how the idea is "sold" to the people—whether as a penalty for past sins or as an aid toward a better future—and how it is executed in practice. It is likely that in every country an increasingly large section of responsible public opinion not only will resign itself to the temporary loss of internal self-determination, but can be convinced that this is the way to a better future. If a nation placed on probation has the opportunity to prove its good will and its capacity for self-government, political tutelage may become acceptable as a step toward national redemption.

#### GRADUALISM AND THE TESTS OF SELF-DETERMINATION

A final argument may be added. Political tutelage operates as a shock absorber for a nation used to being commanded by authoritarian rulers, either dictatorial or dynastic, that is plunged into self-government. It provides for an internal cooling off period, the respite required for democratic incubation. It permits the people under political tutelage to manifest tangibly and measurably the sincerity of its conversion to political democracy. If a people is unwilling or unable to elect to its national assembly a majority genuinely dedicated to constitutional-democratic government; if the national assembly is unwilling or unable to devise and agree, by substantial majorities, on a democratic constitution; if, finally, the nation is unwilling or unable to ratify the democratic constitution by a substantial majority, it would certify beyond any doubt that the nation is not qualified for self-government, and, thus, cannot enjoy internal self-determination. Political tutelage must be continued until the nation has become ripe to govern itself in such a way as to leave no reasonable doubt that it has dedicated itself to political democracy.

Political tutelage, thus, is chiefly an instrument of gradualism in the restoration of internal self-determination. The intensity of its political curbs and controls is correlative to the degree of political consolidation within the country. It is obviously impossible to keep powerful nations, essential for the stability of the European continent, permanently under mili-



tary occupation. It is no less impossible to admit the Axis states and their satellites, at once or within a predetermined period, to sovereign equality and the full enjoyment of sovereignty and self-determination. A realistic balance must be struck between these two alternatives. The workable solution may be found in the progressive political rehabilitation of these nations—a gradualism which would permit them, by their own actions, to regain the confidence of their outraged victims and their own national dignity. If a people were kept under political tutelage indefinitely, and without hope of ultimate redemption by its own efforts, it would be made so desperate as to become a nation of incorrigible criminals. Political tutelage, therefore, must be conducted in a manner to regenerate its self-respect and to invoke its cooperation. It is for this all-important reason that the tutelage must be implemented by a conscious effort to restore political self-confidence to a nation—or, to be more precise, by the prospect that the nation will again be the custodian of its own freedom. This is the purpose of long-range measures, to be discussed in the next chapter.

#### INTELLECTUAL RELIEF AND POLITICAL REHABILITATION

Here is the point for a contribution to the much discussed and much abused topic of political "reeducation" of the defeated. The sweeping generality that a defeated nation, or any people for that matter, can be "educated" from without—whatever this means—is an arrogant fallacy. Not only is it tainted with the supercilious pretence of intellectual imperialism that the law can be taught to the lesser breeds by educators who themselves badly need education. Compulsory reeducation would defeat its purpose because it would be resented as a penalty. No nation can be made conscious of political values that are cultivated abroad unless they have penetrated into its experience by its own efforts and have become incorporated into the national patrimony. But, in spite of such well founded skepticism concerning reeducation on a grand scale, the politically more advanced nations should make the facts of their

democratic organization accessible, in appropriate ways, to nations which until now have seemed to be unimpressed by them.

Political tutelage might well be considered to include the acquainting of receptive sections of a defeated nation with the principles and techniques of political democracy, which they know only as distorted by the totalitarian propaganda apparatus. During the years of occupation, some of the European nations were forced to live in an intellectual vacuum. What knowledge of the world outside they possess was imparted by party hirelings in the universities, schools, the press, and the radio. If the peoples are to choose political democracy as their form of government they must first be placed in a position to learn something about it. It would seem proper for the Constitutional Commissioner and his staff to devote to this task an inspirational effort which may become, if skillfully conducted, an educational campaign for democracy. Willing recipients of such information are many among the educated, press, radio, and civil service, the new leaders on the political scene, and, last but not least, the common man who as voter has to make his choice. He should not adopt foreign patterns slavishly, but understand them so as to be able to adjust them to his national needs. Relief and rehabilitation have to fill not only the empty stomach and the empty tool shed, but the empty mind.

This situation offers a unique opportunity to the political scientists of the United Nations. Guidebooks should have been distributed not only to the soldiers on how to behave in a foreign land, but to the foreign peoples on how to behave in a democratic environment. What is needed is a Baedeker through the world of democracy.<sup>11</sup> The constituent assemblies will not be in a mood to send visiting committees abroad to study foreign institutions on the spot and to report back. We must bring the knowledge of political democracy to those who need it, and must have it ready for their use; and we are woefully unprepared for this task. Books should demonstrate to the defeated that their defeat was not due to the greater resources but to the superior forms of government of the United Nations. Such

information should be imparted objectively, adjusted to the different levels of popular demand and intelligence.

How the Constitutional Commissioner will accomplish this important function is difficult to determine in advance. Refugee scholars might be used who, having acquired sufficient knowledge of and enthusiasm for democracy in their countries of adoption, could communicate these to their former countrymen; but they would be distrusted as evangelists of the democratic gospel because they are refugees. Concise descriptions of a popularly intelligible if scientifically unobjectionable level could be offered in translation—such as W. Ivor Jennings's admirable little book *The British Constitution*, and Charles A. Beard's *The Republic*. Primers on democratic institutions in the language of the country should be prepared and distributed. Local libraries should be stocked with more specialized material. Lecturers could be attached to the universities and radio stations. Informants on democratic constitutions and institutions might even be placed at the disposal of the provisional governments and the constituent assemblies, as technical advisers. The undertaking would be propaganda, but propaganda of a novel kind which would pay ample dividends in opening up minds heretofore closed to the democratic values.

#### POLITICAL TUTELAGE AND THE "SPHERE OF INFLUENCE"

The scheme of establishing political tutelage over the defeated nations would be unrealistic without some observations on a related though not necessarily identical phenomenon. The pattern of political control which begins to emerge in Europe—preluding, perhaps, similar power configurations in Asia and the Americas—strongly suggests the existence of what historically are called "spheres of influence," areas in which the interest of one or another of the great powers is predominant.

Out of the war the United States, Soviet Russia, and Great Britain have arisen as the three "hegemonial" powers which by virtue of their space and size, population, resources, and prestige will by necessity control the world, at least for the extended period which coincides with reconstruction. The admission of

France to the inner circle of the world's governing body of states may, or may not, be justified by historical and traditional reasons. In terms of actual political potentialities France is no longer a great power measurable by the standards of the Big Three. China customarily is added to the three great powers more for reasons of political aesthetics or for courtesy dictated by admiration of the moral courage of the Chinese people than because of its capacity in the immediate, or even in a more distant, future to participate actively in the political direction of the world. In the opinion of the experts not corrupted by the mesmeric salesmanship of one of the most clever and attractive women of our time, China in spite of the ingrained tradition of social democracy, is not at present a democracy and perhaps is not even a state.

Apparently the British sphere of influence extends to the Mediterranean while the Soviet Union is the hegemonial power in Poland, Czechoslovakia, Hungary, Rumania, and Bulgaria. The United States, for obvious geographical reasons, has no such zone of interest—a fact which may, or may not, strengthen its hand in political reconstruction. However, Austria is to be treated as a joint responsibility of all three powers though at the end of the war she found herself perversely slanted toward the Soviets. The zones of influence touch and overlap in Germany in whose political condominium France also participates. Necessarily Germany will become the crucial test between the conflicting principles of joint responsibility and sphere of influence.

That a great power exercises predominant influence in the area adjacent to it is a historical fact well known through the ages.<sup>12</sup> With it goes the realization that the international equality of states exists more in the imagination of writers of textbooks on international law and specialists in diplomatic protocol than in the real world which is governed by power, and not yet by law. Our thinking was bound to become "spatial." Geopolitics is by no means a satanic invention of the evil genius of the Nazis. If stripped of the connotation of world domination, it is the inescapable result of geographical and demographical facts

which constitute the substructure and frame of interstate power relationship. Frank admission of this situation does not imply denial of the cultural, sociological, political value of the small state. On the other hand, the impact of technology and of economic and ideological integration of the world no longer permits the small state to exclude itself artificially from the larger area in which geography has placed it. Complaints that the plan for the international security organization neglects the small state emanate from the legalistic concept that the world society should be constructed along the lines of a corporation with equal rights for all stockholders. Small states are well aware that there is no escape from the facts of size and location and that existence within the orbit of a great power may be a better protection than a mechanical equality developed by international law. Political reconstruction would be much easier if it were generally recognized that small states are small and big states are big.

In the past the political influence of the hegemonial state was limited, as a rule, to the international status and foreign affairs of the states within its reach. The "subordinate" states were expected to adjust their foreign policies to the interests and desires of the hegemonial power, but their internal organization was not touched. Once more it seems as if our political thinking has to undergo considerable reorientation. Certainly the actual power relationship between the hegemonial state and the states within its sphere of influence does not necessarily imply complete political control by the former over the internal affairs of the latter, converting them in effect into "satellite," "puppet," or "vassal" entities on the Nazi or Japanese pattern. The Atlantic Charter has not become so far denuded. But the Second World War has been fought primarily as an ideological war, and it is obvious that the hegemonial power cannot help having an interest in the forms of government of the states within its sphere of influence. None of the great powers would be indifferent to the emergence of a fascist form of government in any state within its area of control. By the same token the British would be disinclined to allow a

state within their sphere of influence to set up a Soviet form of government; nor, for that matter, would Soviet Russia consider a capitalist democracy in its sphere as a "friendly" government. Each controlling power will insist on at least a modicum of affinity in form of government within its sphere; and this attitude rests upon the realization of the influence of the form of government over the conduct of the foreign policies of the individual state.

The situation is unpleasant and regrettable. It would have been infinitely preferable in European reconstruction for the three great powers to agree to exercise collective political control over the liberated nations. Obviously the very concept of the sphere of influence is tainted by the old vices of power politics and imperialism. From the viewpoint of the democratic rehabilitation of the peoples concerned, Europe should be treated as a unit and in unity by the great powers. This does not necessarily imply that there should not be distinct areas of military occupation assigned to each of the powers. A military condominium rarely if ever has proved beneficial. But the splitting up of Europe into different spheres of influence clearly contains the germs of future dissensions among the great powers, a danger which no international security organization can effectively control.

#### A TIME FOR COURAGE

The proposal to make certain peoples international wards for an indefinite time will doubtless be branded extravagant, outrageous, and absurd, as well as inoperable and impossible of execution. The plan is frankly revolutionary, reversing the accepted doctrine of unabridged internal self-determination, granted in the past even to nations defeated in war. But the Nazi onslaught against human civilization was not less unorthodox. The world cannot risk a repeat performance. It cannot be too strongly emphasized that the counterrevolution against the ideas of 1789, of which modern totalitarianism is merely the outward reflection, has not been stopped by the collapse of the dictatorship in Germany, where it reached tech-

nological perfection. The assault against constitutional democracy is certain to continue in disguise and under cover, biding its time. Nor is there any assurance that the aggressor nations, reared in submission to authoritarian domination from above, would in defeat turn back to Damascus if left again to their own devices. An interlude of apparent contrition may follow. But it is most likely that the democratic forces in their midst will be outvoted and outgunned again, unless protected from outside, by the unchastened believers that might is right. The myth that the harshness of Versailles was responsible for Hitler and the Nazis has been exploded by the Germans themselves, who in spite of Versailles became so strong that they could challenge the entire civilized world and missed only by a very narrow margin gaining the mastery of the world. For once, appeasement of the nation that brought untold misery upon the world and itself should not take precedence over efforts to establish a world order free from German aggression. Repentance, this time, should come before forgiveness. Political tutelage, or whatever name be given to Germany's loss of the right to self-rule, is the keystone of world security.

## CHAPTER II

### *The Sheet Anchor of Political Democracy*

#### THE LIMITS OF COMPULSION

Political tutelage is merely a short-range means of political reconstruction. Its purposes are primarily preventive—to restrict the internal self-determination of certain countries until democratic techniques can be established and their use taught. But institutions, important as they are, should not be overvalued. Imposed by command or accepted grudgingly, they will not “take” with an unwilling people. It is the freewill acceptance of such institutions by a substantial majority of the people which will make them work. The spirit cannot be commanded, though it may be guided and protected against abuses. The situation was different in 1918, when the nations under political reconstruction turned to political democracy as the most obvious and generally accepted solution. After the Second World War there remain substantial authoritarian residues; moreover political democracy finds strong competition in the appeal the Soviet form of society exercises on many. Nor should it be ignored that the success of a particular form of government is determined less by its intrinsic merits than by the social and economic conditions of the people living under it. Under propitious conditions the political institutions which embody the form of government are taken for granted, but in adversity a nation ascribes its plight to its form of government. Democratization by compulsion—be it ever so benevolent—is futile unless made effective by the people’s genuine cooperation. At best political tutelage is the crutch on

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See pp. 484-485 for footnotes to this chapter.



which the people have to learn to walk. But political tutelage, military occupation, economic restrictions, discriminations in international status, cannot continue forever, and will become increasingly difficult to maintain. The memory of human suffering is short; new generations in the victorious and the defeated nations will grow weary of anything that breaks the normalcy of national development and international intercourse. Consequently, short-range remedies must be followed by long-range planning for political reconstruction. A more effective antidote must be found against the perversion of democratic government into authoritarian. Political tutelage alone cannot make democracy safe in the world.

#### THE OPTIMISM OF DESPAIR

One must venture an altogether different approach. Granted that the democratic form of government cannot be "rammed down the throat" of an unwilling and unprepared people. But, for a change, one might try to feed it to them as their regular diet, as their daily bread. The constructive proposal submitted here is to make the people themselves the custodians of their own freedom by giving them, individually and collectively, the explicit and formal right to participate in their government.

The success of democratic reconstruction is predicated, in the last analysis, on the faith that every people, given the opportunity, will prefer political democracy to any other form of government. As an article of faith, this assumption is beyond rational proof. On the other hand, if it is not provable, it cannot be disproved by the allegation that certain nations are congenitally incapable of, or intrinsically averse to, the democratic solutions of political organization. A considerable body of public opinion, sustained by the strong evidence of what appears to be an almost unbroken record of authoritarian government, high-lighted by five wars of aggression within less than a century, finds the German people incorrigibly addicted to autocracy and all that goes with it. If this assertion were provable, it would be, in the long run, safer and less

costly to the other nations, profiting by the opportunity of unconditional surrender, to put the German people to the sword, exterminating them to the last man, woman, and child in the human slaughterhouses they invented for the hapless Jews, slave laborers, and opponents, and to settle better people on their land. To the pessimists the only choice is between wholesale annihilation, which cannot be carried out for moral reasons, and permanent political tutelage, which cannot be continued indefinitely on technical grounds.

There is only one way out of this impasse: to trust the people, even the German people. This solution is dictated by what one may call the optimism of despair. Granted that, in the light of the gruesome evidence against Germany, optimism is as difficult as despair is facile. Human nature seems to be impossible of improvement. While we may have made progress in controlling the forces of nature, we have made none at all in controlling human nature. But history has reached the turning point where economic *laissez faire* is to be abandoned in favor of social and economic planning, which aims at a rational distribution of resources and wealth among the nations as the first step toward a more stable political order, and we may make an attempt at political planning for democracy—provided it is a desirable form of social organization—without being accused of a stratospheric flight of imagination.

#### THE GERMAN PEOPLE—ARE THEY INCORRIGIBLE?

In not too distant a future the host of books on the incurable viciousness of the German people will make strange reading, whether written by vain *literati* like Emil Ludwig, honest fanatics like Lord Vansittart, respectable pessimists like Friedrich Wilhelm Förster, or unadjustable refugees like— But names are odious. Anti-German (as distinguished from anti-Nazi) books cannot be denied a definite moral justification or practical function; democracies, even when at war, are reluctant to excoriate the enemy. This is just one of the reasons why they are democracies. War-conditioned emotionalism of a nation dragged to the brink of the abyss by the Nazi assault

may condone even hate books written by men who never have set a foot on German soil or never have met a German except in Hammersmith or Brooklyn. More offensive to historical sanity are those anti-German books which, in the guise of "objective" science, medical or otherwise, or under the pretense of "research," discover the "roots of National Socialism" or the "German cancer" in every past expression of a German, or smell a "Thousand Years' Conspiracy" or a "German Witches' Sabbath" in everything any German did in the past. It is easy to compile statements from important or, preferably, unimportant Germans through the ages and present this authentic anthology of "Thus Spake Germany" as the mirror of the German mind.<sup>1</sup>

I hold no brief for the Nazis—or for the Germans. But whoever, in this time of absurd oversimplifications, is aware of the responsibilities of the scholar is compelled to qualify the distinction between "bad" and "good" peoples as un-Hellenic and un-Christian, and (what perhaps is worse) as undemocratic and unscientific. It applies the "folkish" imbecilities of the Nazis, which such books untiringly expose, to the Germans themselves, without thereby making the racial concepts more plausible or more provable. It is readily admitted that the wave of wanton destruction released upon the world by the hordes of mechanized mysticism will leave deeper traces, which will last much longer, than the traces after the First World War. Guernica, Warsaw, Rotterdam, Coventry, Lidice, Florence, and many more will remain as symbols of the evil long after they have arisen from the ashes. The horrors of the bestial concentration camps will not easily be forgotten. No person in his senses will expect the maimed victims of the latest *furor teutonicus* to gather the perpetrators to their bosoms, without a prolonged probation under political tutelage. After this war retribution, reparation, repentance must not be whittled away.

But the long-range policy of political reconstruction is not served by assuming that all Germans are Nazis. It is not even true that all Nazis are Germans. Nazis are found in all countries, in all climates, under all forms of government. Nazism

has become an international phenomenon, disassociated from Germany and therefore most unlikely to perish from the earth the moment it is destroyed in the land of its origin and perfection. Even if it were provable that Nazis and Germans were one and the same, the proving would be utterly useless for political reconstruction. In this form the issue is not only irrelevant and immaterial; it is wrongly presented. What should be asked is, How could a perverse system of government take root primarily among the Germans? What is it in character, mentality, history, *mores*, that makes the Germans more receptive of the blandishments of power without justice, of force without law—in short, of autocracy? What is the explanation of their lack of resistance to authoritarian control? Whether the Germans are Nazis is a moot question. But it is most important to remember that the Germans—even such as disliked or hated the regime—allowed it to root itself firmly in their soil. Certainly not all Germans were Nazis, and a majority might even have repudiated Nazism had they known where it would lead them. But the Germans as a nation tolerated the Nazi regime. The guilt of the German people is not intrinsic depravity and viciousness, but a lack of courage, a submissiveness to authority regardless of legitimacy. The German people consented to be led by barbarians. The frantic efforts from exile of some former trade-union leaders and politicians to salvage Germany by absolving German labor from complicity in the national guilt, are utterly unavailing. Where was the Reichsbanner, the vaunted military organization of the Socialists for the defense of the Weimar republic, where were the powerful trade unions themselves when Hitler seized the government in March, 1933? Not a single trade union defended itself to the last man with what arms it had. Their convictions were mere paper, and their martyrdom is *ex post facto*. It was left to the defenseless Jews, decimated in the ghetto of Warsaw, to teach them and the world what courage and sacrifice mean in the face of overwhelming odds. The ineradicable guilt of the Germans is that they allowed the Nazis to overpower them without even mak-

ing the motions of armed resistance. Individuals have died for the cause of freedom in the concentration camps or in the underground. But for a decade and more there was no large-scale resistance—let alone mass resistance. And the number of refugees who fled from Germany without persecution for racial or personal reasons is appallingly small. Very few important Germans of this category—whether industrialist, artist, official—felt compelled to protest against the regime by fleeing abroad. Nor did the German masses rise in wrath against their masters when the sands of the Nazi regime were running out. The Italians at least have to their credit that they helped to down Fascism and the foreign cohorts in its service. Not in a single instance was there a duplication in Germany of the popular vengeance meted out to Mussolini. The guilt of the Germans is their collective cowardice, engendered by their national trait of submissiveness to any existent authority. The Nazis had won an election, and therefore were the “legal” authority. Later, when the regime seemed to be doing well, when easy victories were obtained over weaker and skillfully corrupted nations, when the loot from conquered Europe was siphoned down to the lowest layers, even the non-Nazis were German enough to support the Nazis. Collective cowardice became collective brutality. The forces of resistance to the evil were too weak. When lawlessness bears dividends, it is recognized as a respectable source of income.

It is here that the lever of political tutelage has to be applied in order to lift the German people from the morass of collective cowardice and submissiveness, and to make possible their integration into long-range political reconstruction. History records no basically “bad” people, in spite of the labeling of the Huns, the Saracens, the Mongols, and the Turks as such by their victims. Nor is there any historical reason why the Germans must remain aggressors in the future. Before Waterloo, France was the perpetual aggressor in Europe. What is needed now is a deliberate and conscious effort to build up and strengthen the Germans’ own resistance against ingrained authoritarianism, and to protect them in the meantime against

the evil spirits in their own midst. This is the reason why their political self-determination must be suspended until they are definitely converted to democratic principles and can resist unaided a relapse into the authoritarian tradition. Forcible political reeducation of a nation is as futile as imposition upon it of an alien form of government. Political reeducation must be by the Germans themselves, subject to proper precautions by the victorious nations. Political tutelage is the salvation of the German people.

Whether there will be a Hitler legend will depend as much on the victors as on the Germans. In the long run, a nation so gifted, so hard-working, so state- and authority-conscious, so law-abiding (abiding even by the law of lawlessness), cannot be denied a place in the community of nations commensurate to its geographical location and the weight of its numbers. If it be possible to protect the Germans against themselves, to create a consistent democratic core around which their erratic political mentality may congeal, it is in no wise hopeless to cure them of *Weltfeindlichkeit*, which, an acquired and not an innate quality, is of recent origin only. Universalism was formerly conspicuous in their intellectual heritage—as self-centered introspectiveness, breeding power-worship and aggression, has been since Bismarck. To date they have tried to fulfill their destiny for dominating others. Why not turn the tables on them and offer them the chance of regaining, along with the respect of other nations, their self-respect and dignity? There is a strong vein of *Weltfreundlichkeit* in the German blood. After all, it was Kant who wrote *The Eternal Peace*, Beethoven and Schiller who bestowed on the world that hymn of human redemption, the Ninth Symphony, and Goethe who was the discoverer, molder, and apostle of *Weltliteratur*, the world of universal art.

It may sound sacrilegious at this juncture, but I for one believe that some day the Germans will make tolerably good, perhaps even model, democrats. This vision of political democracy as the German way of life may seem phantasmagoric so soon after the close of the European war. To believe in it is

the limit of "optimism of despair." But no other alternative is possible.

If hope of democratic integration is tendered to the Germans, it cannot be denied, by the argument *a majori ad minus*, to the German satellites. None of them is a hopeless candidate for political democracy, granted active assistance, or at least freedom from interference, by the victors in the effort to free themselves from their authoritarian ruling classes. The traditional paternalism of Central and Eastern Europe will disappear unless artificially bolstered from outside. The common man of this day and age is democratic-minded, and is no longer congenitally resigned to acceptance of commands from above. It is significant that neither the Italian nor any of the satellite nations has the reputation of being basically "bad." The Czechs, as much accustomed to being subjugated by a ruling caste as the other nations of Eastern Europe, made a success of democracy within two decades after their liberation from the Austrian regime. Why should not the Hungarian, Croat, Austrian, Rumanian peasants, under proper precautions and proper guidance, learn the art of self-government like politically older nations? But none of them can be trusted without a period of probation under political tutelage.

#### A NEW INDIVIDUAL LIBERTY: THE RIGHT TO PARTICIPATE IN THE GOVERNMENT

However, the crucial question is still unanswered: How can the long-range aim of political reconstruction, the conversion of traditionally authoritarian peoples to political democracy, be accomplished in practice? It is suggested here that every nation after the war should implement its bill of rights with a new political right, tentatively phrased as follows: "*Every citizen has the right to participate in the government of his state through democratic elections.*" It is assumed that, in conformity with the practice of the majority of states, the bill of rights forms an integral part of the constitution and thus is protected against infringements by the government in office and against ordinary legislation by the parliament.

The essential purpose of including a political *right*, in the technical sense, in the catalogue of guaranteed individual liberties and social rights is to place every state on the basis of democratic legitimacy. To assign to every citizen the formal right to participate through democratic elections in the formation of the will of the state, will be to make the people the custodians of their own freedom. Where such a right exists and is observed, the state by necessity is a political democracy.

#### THE POLITICAL RIGHT AS POSITIVE LAW

The student of comparative political institutions is aware that the catalogue of civil liberties, constitutional guarantees, and human rights which has entered into every bill of rights since the memorable precedents of the American and the French Revolution has become so highly standardized in all states on a certain political level that their respective bills of rights may be exchanged freely without losing much of their legal identity. Moreover, until recently their content was almost "frozen." While the "frame of government" itself has changed considerably, not only from the over-all viewpoint but frequently within the same state, the bill of rights was passed on to each succeeding generation almost without change. However, what appears strikingly new in contemporary bills of rights, and sets them off from those formulated in the nineteenth century, is the increasing insistence on and relevance of social rights. The phenomenon marks the transition from a liberal-bourgeois society to a collectivist and intrinsically anti-capitalistic society. Technically the social rights differ from the "liberal" rights. They are not mere points of program or ideal postulates. They enjoin on the state definite obligations to be fulfilled by positive actions.

The new "political" right suggested here is likewise positive in character. It is not a liberal right which merely demands that the state refrain from interference with its exercise. It demands that the state take definite steps to implement it; that is, provide democratic elections which will enable the people to participate in the government by appointment and



control. To include a separate and definitely stipulated "political" right in the catalogue of customary individual guarantees is admittedly novel. For such a departure from a time-honored technique there must be a convincing reason. With the customary division of a constitution into the "frame of government" and the "bill of rights," the arrangements for the formation of the will of the state, which reflect the form of government, were confined to the former. The bill of rights remained indifferent to the form of government. The right of the people to participate in government through democratic elections was nowhere explicitly stipulated. At best it was implied in the institutional structure of the frame of government. In our time more is needed if democratic legitimacy is to be a living reality. It demands a positive and unequivocal statement, as basic and paramount as any other individual right, even more so, since all other constitutional guarantees are safe only where a nation operates its state as a political democracy. The right to participate in the government can no longer be left to insecure anchorage in the institutions. It must penetrate into the mind of the people. By inclusion in the catalogue of individual rights the democratic form of government is stressed not merely as a technical device of government, left to the discretion of the individual state or nation, but as an irrefragable principle of universal validity, equal with freedom of religion, speech, personal liberty, and the rest. It is precisely to make political democracy mandatory that what heretofore has been an institutional technique is presented here and now in the solemn form of an inalienable right. A state in which the people determine the will of the state through democratic elections cannot help being a political democracy.

I am fully aware of the obvious objections. It would be absurd to assume that putting the new political right on the patient paper of a constitution either would inaugurate, or could guarantee, the democratic millennium of peace on earth and good will to all men. If a military junta, or any other power-group in a particular state, is able to obtain control

of the armed forces and to impose dictatorship on the people, no constitution can prevent it. Tanks and airplanes are more eloquent than any tabulation of rights. Political power does not require a constitution to be effective. Illustrations abound, of how little constitutions mean when colliding with naked steel. Autocracy will not be made impossible until a democratic world government checks it wherever it raises its head. No such world government is in sight. Dumbarton Oaks planned anything but a superstate. The San Francisco Charter is the frame of a world security organization, which remains indifferent to the internal form of government of its members as well as of other states. But the existence of a definite political right would make autocracy and authoritarian usurpation more difficult because it would openly violate an established right of the people. Where the people have the *right* to determine their government and to hold it to account by democratic elections, it becomes clearly illegal to introduce authoritarian elements into the constitution by stealth and to convert a constitutional state into an autocracy by indirection.

#### THE CAUSAL RELATION BETWEEN HUMAN FREEDOM AND POLITICAL DEMOCRACY

This is no foolproof guarantee against the overthrow of a government by force and violence, but is at least an improvement of the existing situation. In order to appraise the merits of the new political right, one must understand the techniques of modern absolutism. It did not spring into life as Minerva sprang from the head of J̄upiter. Modern dictatorship seizes power by the step-by-step technique of "legality," bending democratic institutions to its own ends. It begins by undermining and invalidating the traditional civil liberties. Only when constitutional guarantees have been sufficiently eroded does it show its true colors. Denial of civil liberties is the hallmark of dictatorial regimes. Dictatorship cannot exist where civil liberties are intact. All other human rights are operable and effective only in a political democracy. Unless the citizens freely elect and continuously control their government,

all individual liberties are in jeopardy. There is no historical record of any nondemocratic government which, in the long run, has respected civil liberties. Aristocratic England before the Reform Bill is no evidence to the contrary; otherwise the United States would be a British Dominion today. To the contention that even authoritarian monarchies granted their people civil liberties and maintained them, like Imperial Germany after 1871, the answer is that, while the administration felt itself bound by the existing positive law under the concept of the rule of law, civil liberties were observed only in so far as they did not interfere with the political aims of an authoritarian government over which the German people had no control. Freedom of speech did not include criticism of the Kaiser, freedom of political organization did not apply to parties stigmatized as subversive; under Bismarck the Socialist party was outlawed for twelve years. Equal access to office was denied to political nonconformists and Jews. Individual rights exist, and are protected adequately, only in a political democracy. The right to make and to unmake the government is the capstone of the entire edifice of civil liberties. This is the lesson contemporary dictatorship has taught us. Without the political right all other individual rights operate in a vacuum.

#### WHAT ARE "DEMOCRATIC" ELECTIONS?

Once more we must return to the maxim that we cannot ram our form of government down the throat of another people. As explained previously,\* "political democracy" is a generic term, which does not imply a uniform pattern of political organization or constitution. Within the limits of the "nuclear demands of democracy," any variant of democracy is permissible. To object that, by stipulating a mandatory right of participation in the government, the state individualities are fastened to the Procrustes bed of a standardized political organization, is beside the point. The "nuclear demands" are wide enough to accommodate any existing or future

\* See *supra*, pp. 129 ff.

realization of political democracy; but their interpretation should be so strict as to exclude any authoritarian double-cross.

Because the new political right is intended for insertion into a legal document, its phrasing here is necessarily laconic. It would be made more intelligible by expanded expression, for which the reader is referred to my exposition of the "nuclear demands of democracy" earlier in this book.\* Recapitulation here would be merely repetitious.

There is, however, one aspect which requires further explanation. In a political democracy the will of the people can be ascertained rationally only by democratic elections. Correlative to the right of the people to have democratic elections is the duty of the state to provide for them. But what precisely are "democratic" elections?

(a) An election is democratic if, under the terms of the constitution, it provides for representative legislative bodies (parliament, congress, councils, etc.), or for executive, administrative, or judicial offices. The core of a political democracy is a representative legislature, elected by the people under a system of freely operating parties. But beyond the basic requirement of a representative legislature the individual state may adopt any political system adjusted to its national habits or needs. This permits any known variation of political democracy, any form of the constitutional state that may be devised in the future, in which the government is elected, directly or indirectly, by the citizens and remains accountable to them for its conduct of office.

(b) An election is democratic if the will of the people and their control over the government are manifested at reasonably frequent intervals. The election, however democratic, of one man to be the exclusive legislator and executive for an indefinite period—which is the hallmark of Caesaristic dictatorship—would be illegal. Election, hence, of the chief executive and of the members of the representative legislature must be periodical, and reasonably frequent. Frequency and regu-

\* See *supra*, pp. 119 ff.

larity depend on the habits of the individual state. Frequency, however, does not mean the perfect regularity of arithmetically equal intervals, in view of the practice of states which terminate the existing parliament by dissolution before its legal term of office has expired.

(c) An election is democratic if it is operated by democratically organized parties, and if its procedures and techniques permit the adequate expression of the will of the voters through representative institutions. Within these limits the individual state is free to elaborate its electoral laws as it sees fit. It is evident, however, that democratic standards should prevail in every stage of the electoral process. A democratic election, thus, is based not only on a democratic suffrage, but on a democratic electoral system. It should protect the voter against undue interference by state authorities, parties, groups, individuals, through psychological pressure, excessive propaganda, intimidation, or violence. It should provide for secrecy of voting, impartial determination of the election results, elimination of illegal and corrupt practices. Beyond these guarantees of a fair election no specific method of voting is mandatory. An election is democratic, whether based on the system of majority, second ballot, plurality, or proportional representation. But democratic standards require that the majority ultimately decide.

Political democracy is likewise compatible with other rational manifestations of the popular will, such as referendum and initiative for objectives of internal legislation; plebiscites for issues relating to foreign policy; the recall of officers and parliaments by the electorate; officially admitted opinion polls; direct participation of the people on the local and municipal level. Other methods of making public opinion articulate may be developed in the future. However, they could hardly conform to political democracy if established as a substitute for, instead of an implementation of, genuine representative bodies, which, in our mass society, will remain the primary method for expressing the will of the people. Nor would nonrational and nonmeasurable manifestations, such as parades, demonstra-

tions, mass petitions, private straw votes be considered as adequately expressing the will of the people.

From the foregoing comments on the new political right it appears that, while establishing political democracy as the mandatory form of government in every state, it does not require a uniform political pattern, a "model" constitution, or other kind of compulsion. The *ceterum censeo* of this book is that autocracy as a form of government must be outlawed; and this can be accomplished only by destroying the dogma of the sanctity of internal self-determination. But it does not follow therefrom that a specific form of government is to be rammed down the throats of other peoples.

#### THE PROSPECTS OF REALIZATION

Is there a chance that the right of the citizens to participate in their government will become incorporated into the national bills of rights? This is indeed a long-range feature of political reconstruction. The ideal solution would be for all civilized states, by an international convention, to agree to include the new political right in their existing or future bills of rights. But this cannot be expected within a foreseeable time. Yet the chances of acceptance by the several states are not altogether hopeless. States which practice political democracy would be disinclined to formal acceptance of a legal rule which appeared superfluous; but they might consider it for a future constitutional reform. On the other hand, states which write new constitutions for themselves after the war, may find it advantageous to reinforce their democratic planning by converting political democracy into positive law. On the Axis states and their satellites the new right could be imposed by the peace treaties or through political tutelage. It must be remembered that, as long as the tutelage lasts, enjoyment of any constitutional guarantee will be limited by the requirements of the tutelage; but if the new political right is incorporated in new constitutions it will become automatically operative as soon as political tutelage is sufficiently relaxed to allow normal operation of the democratic processes. More difficult

will it be to win the ruling oligarchies in democratically marginal countries to formal endorsement of a legal rule, application of which would endanger their restoration to and maintenance in political control. In such cases, diplomatic pressure failing, only world public opinion can compel a change.

Thus, the realization of the postulate of making the citizens the keepers of their own freedom through a new political right depends largely on endorsement by public opinion at home, which must convince itself that here is a better guarantee against the danger of recrudescent autocracy than any compulsion from without. This is a long-range educational process; but, with the memory of suffering under war and Nazi domination still fresh, the chances to make democracy a living reality would seem to be much better than at any time since 1918. The prestige of the democratic form of government is immensely enhanced by the victory over the vaunted "efficiency" of the dictatorships. This opportunity should not be missed by the statesmen of the democracies. The iron must strike while it is hot. The citizens standing on their democratic birthright should be supported against reactionary governments eager to regain their prewar authoritarian control. It may even be hoped that, if political democracy is converted into a positive right of the peoples in some states, pressure of public opinion in others will compel their authoritarian governments to grant it likewise to their peoples. A government which refuses to accede to the democratic aspirations of its people will stigmatize itself before the whole world as lacking democratic sincerity. The impact of world public opinion, in alliance with the unrelenting opposition from inside, recently brought about the democratization of the authoritarian regime of Vargas in Brazil; and this resounding success of the democratic idea was all the more remarkable because the dictatorship in Brazil, a member of the United Nations and an active participant in the European war, could have countered any official hint to change its form of government by insisting on the right of internal self-determination. Unfortunately, the

salutary effect was canceled out subsequently by the admission of dictatorial Argentina to the United Nations.

The best prospect of long-range reconstruction lies in the formation of a Democratic International carried by world opinion beyond the national borders.

#### INTERNATIONAL PROTECTION OF POLITICAL DEMOCRACY

##### (a) *By an International Organization*

In an era which witnesses the emergence of a more closely knit international order one may well envisage an international protection of political democracy. The proposals of Dumbarton Oaks, to be discussed in the next chapter, may appear to some as the serviceable basis of a progressive integration of world security; to others as an unimaginative repetition of the Geneva system. But, whatever may be the international organization, it is certain that its methods are determined by gradualism, its aims by pragmatic requirements. First things come first, and the international protection of political democracy is not among them. The form of government of the member states of the international community, and their domestic and internal affairs, are so delicate and explosive that, for a long time to come, they will not be on the agenda of an international security system. The hope that the states, in the dithyrambic enthusiasm of the dawning brave new world, would sacrifice their internal self-determination on the altar of international brotherhood was utopian from the start. It has been convincingly disproved by the rebounding nationalism of the peoples liberated from the New Order who insisted on cleaning house for themselves. What happened in Greece, Belgium, Italy, and elsewhere does not augur well for the self-limitation of self-determination. Even less would the great powers tolerate any infringement of their internal sovereignty. Nobody in his senses can see a new League of Nations ordering the United States to let the colored people ride in the Pullman cars between Memphis and Chattanooga because their exclusion violates the international concepts of political democracy.



Unless the idol of internal self-determination is smashed, political democracy within a state cannot become a legitimate objective of international law or international action. Only if and when the maintenance of political democracy is made a universally accepted international obligation of the states, will its violation constitute occasion for asking redress from an international organization. Generations will have come and gone—and perhaps another world war will have been fought—before an international solidarity has been created which will cause every state to consider infringement of political democracy in any part of the world as a matter of immediate concern. This far-distant stage of evolution can be reached only when nationalism as the paramount value has been dislodged and relegated to the subordinate place occupied now in international relations by religious differences. But the cloud has a distinctly silver lining. Nationalism seemingly had reached its zenith when Fascism and Communism began operating on transnational lines, irrespective of state boundaries and national sovereignties. What new values will replace nationalism to satisfy the human craving for spiritual ideals, are yet unknown. Poets and visionaries dream of a religious or humanitarian deliverance of mankind from the thralldom of nationalism and class consciousness. All this is mercifully hidden by the veil of the future. We are not concerned here with Utopia; but if ever there is a “world state” it will be composed of subdivisions with a homogeneous form of government which cannot be any other than political democracy.

(b) *By an International Bill of Human Rights*

A less ambitious scheme—and one on which lately public opinion has become focused—is geared to the protection of political democracy through an international bill of human rights.<sup>2</sup> A full-sized discussion of the issue would not only exceed the limits of this book but abuse the reader's patience. Such proposals have been under advisement in the past, advanced mainly by responsible individuals and respectable private groups, with the governments showing only a mild interest

on the side lines. Obviously it is a most fitting subject to include in an international convention or in any plan of a better international order. The unanimity with which the principles of human liberties, constitutional guarantees, and, more recently, also the social rights of the individual are accepted in all civilized states, and the similarity of the institutions resulting therefrom, evidence that the problem of worldwide guarantee of human rights has reached the stage in which its international treatment has become imperative, difficult as it may seem to find formulations precise enough to bind each state to the principles and yet elastic enough to allow adjustment to national requirements.

The lesson inherent in the causality between democracy and the respect of individual rights, on the one hand, and between dictatorship and their negation, on the other, was not lost on the nations. The Inter-American Conference on Problems of War and Peace of Mexico City (Final Act of March 8, 1945) emphasized, throughout, the international character of the essential rights of man by making their observance and protection "an essential principle governing the relations between the States of the American community" ("Declaration of Mexico," Resolution XI, nos. 12 to 14). It is noteworthy that among the "American Principles" is stressed (no. 11) "the fervent adherence of the American States to the *democratic principles which they consider essential for the peace of America*" (italics supplied). In addition, the Mexico conference demanded in a specific resolution (XL) the international protection of the essential rights of man and extended them, beyond the traditional catalogue of individual rights proper, to the principles of social betterment, declaring them "a matter of international public interest" ("Declaration of Social Principles of America," Resolution LVIII), a milestone on the road toward international recognition and guarantee of social justice and security.

The proposals of Dumbarton Oaks ignored the issue. But at San Francisco, at long last, real progress was achieved. Senator Arthur H. Vandenberg's insistence on the inclusion of

justice and human rights as the ultimate objectives of any security organization, together with the protest of progressive public opinion against the lack of idealism and moral courage of Dumbarton Oaks, induced the American delegation to sponsor the proposal that "respect for human rights and the fundamental freedoms for all without distinction as to race, language or sex" be included among the purposes of the international security organization (Chapter I [3]), and that the functions and powers of the General Assembly pertain likewise "to assist in the realization of human rights and basic freedoms for all" (Chapter V, section B [6]). The redrafting of the preamble by General Smuts served the same end.

Considering the progress the idea has made among civilized nations, it is logical to enjoin the recognition of, and compliance with, essential human rights on the defeated nations in the peace treaties and make their fulfillment a specific objective of political tutelage.

But even if it were possible to convert a definite catalogue of essential human rights into the common law of nations it would be a long, very long way from acceptance by individual states to enforcement against a recalcitrant state or government. The unsurmountable road block is once more the doctrine of internal self-determination and the corresponding duty of the states not to intervene in the internal affairs of the others, reiterated and reaffirmed by the Mexico conference and San Francisco. Recognition of individual liberties as positive internal law must remain a dead letter as long as there is no world organization capable of enforcing them against a violating state or government. What has been said before on the impossibility of protecting political democracy without an effective world organization applies no less to the enforcement of an international obligation to observe the agreed content of an international bill of human rights.

The problems are too technical to be treated here in detail, and the following illustrations may suffice:

An internationally agreed individual liberty will be violated, as a rule, by an authoritarian government at the cost

of its people as a whole, or of a disfavored minority. Who is to bring the conflict to the cognizance of the international authority, and how? What will happen if diplomatic pressure or friendly intercession of the international organization proves of no avail? Should the aggrieved group be permitted to bring the issue before the international organization or an international tribunal? Should this be permitted at once, or only after it has been proved that the group affected has met with what international law qualifies as "denial of justice" before the state courts? <sup>3</sup> Who is to say whether justice has been denied in the decision by a municipal court or legislative body? Who is to interpret authentically the state constitution invoked by both the government and the aggrieved individual or group? Would any state permit its own subjects to arraign its legal government before an international organization or court without accusing them of disloyalty or even treason? <sup>4</sup> Under a number of important state jurisdictions no national may sue his sovereign state or its representative, the government. Obviously a malevolent government would leave no stone unturned to prevent its nationals from bringing a case of violated individual liberties before the international organization. Who would be authorized to sue, since international law operates only between states or at least collective entities of an international character, and does not apply to individuals and groups? <sup>5</sup>

On the other hand, should the international organization maintain, in every state, "observation posts," charged with certifying violations of internationally agreed individual rights, by the state government, state courts, state legislature? How would they overcome obstruction of their activities by the authoritarian government? One remembers the sabotage directed after 1919 against Inter-Allied control commissions in Germany, which, after all, at that time was a democracy. What would happen if an authoritarian government, supported by a packed or corrupt parliament, denied the accusation and resorted to self-defense against eventual sanctions? Moreover, the enforcement of internationally agreed individual liberties

would presuppose the existence of an international tribunal for conciliation, arbitration, and decision of such controversies, or at least an International Human Rights Commission. How could the internal conditions in a state become the objective of international adjudication without making observance of internal or municipal law an international obligation of the states? To grant an international court jurisdiction over issues which the state asserted were purely domestic would constitute a revolutionary departure from the existing practice in international law. Moreover, such controversies, being of an eminently political character, rarely would lend themselves to consideration by an international tribunal. How could the award or decision be enforced against an obstinate government or state if diplomatic pressure proved unavailing? Should refusal to comply be overcome by international sanctions?

Such objections, all grown on the luxuriant soil of unabridged internal self-determination, could be multiplied without end. They all amount to this: An international bill of rights would remain merely a declaration of pious intentions, if administered by authoritarian governments which had no interest in the preservation of individual freedoms. The enforcement is so closely linked to the existence of an effective international organization, pledged to uphold political democracy universally, and with teeth in it, that, as long as there is no such organization, the plan cannot be considered as serviceable for the protection of political democracy. It is a vicious circle which can be broken only by the universal acceptance of political democracy as form of government.

#### REQUIRED: A DEMOCRATIC INTERNATIONAL

At this point some summarizing conclusions are in order. Recurrence of autocracy in such states as are habitually inclined or exposed to it must be prevented by political tutelage; this simultaneously will develop democratic incentives enabling the people, at the end of the term of probation, to operate political democracy by themselves with a better prospect of success. An international protection of political democracy can

be expected only after the dogma of internal self-determination has been discarded. As long as it exists, long-range planning for political reconstruction must draw its strength from the democratic impulses of the people in each country. The proposal to grant citizens in the bill of rights, as a new individual liberty, the formal and solemn right to participate in their government through democratic elections, would provide the anchorage of political democracy in the positive law. But its success in any country will depend largely on the active support of the democracy-inspired public opinion in the world at large. Wherever autocracy, under whatever forms, raises its ugly head, democrats in all lands must rally behind the subjected people and, if they by themselves are unable to shake off the yoke, make its cause their own. A Democratic International is the only guarantee of political reconstruction, which, in turn, will be lasting only if guided by the Categorical Imperative of Political Democracy.

### CHAPTER III

## *The Serpent in Dumbarton Oaks*

Twenty-five years after the Committee of Fifteen had submitted the draft of the Covenant of the League of Nations to the Peace Conference of Paris, the government experts of the United States, Great Britain, Soviet Russia, and China presented to the world their Grand Design of International Security under the appellation "The United Nations," known as the proposals of Dumbarton Oaks. While the Covenant makers of 1919 had to build from scratch, the bricks being mainly the utopian schemes poets, philosophers, and visionaries had dreamed through the ages, the men of Dumbarton Oaks had before their eyes and on their fingertips twenty years and more of the bitter and tale-telling experience of the League of Nations, together with an unprecedented wealth of private suggestions. They must have been, and probably were, deeply conscious of the ideological character of this world conflict because democracy and autocracy, reflecting two mutually exclusive ways of life and systems of government, cannot harmoniously exist together in One World. All official war and peace proclamations, from the Atlantic Charter to Moscow, Teheran, and Yalta, had preached and breathed the will to end once for all that threat to civilization—autocracy and despotism. What could have been more natural than to hope that Dumbarton Oaks would place a definite ideal before mankind, be it called freedom, humanity, dignity of man? But seemingly such esoterics were deemed unbecoming to a legal

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See p. 485 for footnotes to this chapter.

document. Even the word "democracy" is conspicuous by its absence from the entire charter of peace. But the least that could be expected was that the proposals of Dumbarton Oaks, calling a spade a spade, would declare frankly that the peace of the world can best be secured by the elimination and outlawry of autocracy as the primary cause of war, and that the most common threat to peace is the internal organization of a state which threatens the freedom of its own people and with it the security of its neighbors and the world at large. One who believes that only free nations can cooperate freely in a free world cannot fail to register deep disappointment that Dumbarton Oaks, even more legalistic and less realistic than Geneva, failed to face squarely the crucial issue of this war and the coming peace.

#### THE NEW PASSWORD: THE "PEACE-LOVING" STATE

However, the men of Dumbarton Oaks knew that international cooperation can be expected only from nations which consider peace as their primary ideal. For this reason they adorned the text with the new password "peace-loving," used as the requisite of the states participating in the future security organization. Says Chapter II (1): "The organization is based on the principle of the sovereign equality of all *peace-loving* states." The expression is repeated in Chapter III (1) "Membership in the organization should be open to all *peace-loving* states."

The concept "peace-loving" as the attribute of the state of the future has a distinctive Anglo-Saxon flavor. Obviously it takes the place of the term "self-governing states" contained in Article 1 of the Covenant of the League.\* The word "peace-loving" is hyphenated. *Honi soit qui mal y pense*. It is something more than an unexpurgated residue of rhetoricism, of which the Dumbarton Oaks document otherwise is remarkably free. Used deliberately as a legal term, it must be subjected to that precise interpretation which the law calls for. Analysis of its substance requires an incursion into semantics.

\* See *supra*, p. 5.



At first sight it might seem difficult to conceive, logically and factually, of a peace-loving *state*. The term seemingly was used for the first time at the Moscow Conference of 1943; and President Roosevelt—a rare master of the word—in his statement accompanying the publication of the proposals spoke no less than three times of peace-loving “*nations*.” The same formula is used in the report on the Crimea Conference. Is the difference in terms—which may seem inconsequential to many—accidental or deliberate?

It is hard to imagine a state as “peace-loving.” The state, as an entity, is an abstraction, like the conceptual and organizational frame of the people who compose it. Even organicists and corporativists to whom the state has become a personalization imbued with reality would hesitate to concede that the state is capable of such anthropomorphological attributes as “love” and “hate.” “The state” as such neither loves peace nor hates war. It is the people of the state, the nation in the state, or the government representing the state that loves or hates. Consequently, “peace-loving state” is a misnomer or, perhaps, an absurdity.

This semantic analysis is not altogether irrelevant, because the term has great practical importance in determining the original membership of the international security organization and in the admission into membership of states ineligible at the foundation that qualify in the course of time; perhaps also in applying sanctions to a member state which, qualified as peace-loving today, might turn not so very peace-loving tomorrow. It may be mentioned in passing that the new security system does not provide procedure for excluding a member previously admitted to the group.

#### THE PROOF OF “PEACE-LOVINGNESS”

At this juncture it may be asked: How does a state, or a nation for that matter, prove that it is “peace-loving,” and on what evidence do other states convince themselves of this? One need not be a prophet to foresee that the world will be treated to the edifying spectacle of the states scrambling for a precious

piece of paper, the certificate of "peace-lovingness," as the membership card in the club called the United Nations. It would be unfair, prejudicial, and dangerous to "freeze" certain popularized suppositions of history to the point of ascribing to certain states intrinsic or congenital "peace-mindedness," and denying the attribute, on similar historical value judgments, to others. The ancient Romans would never have qualified for membership by the token of peace-lovingness: the temple of Janus was closed only twice during the entire Roman history. Historically, the record of aggression of the Turks or the French is as bad as that of any European nation. Or would the Swiss be classifiable as "peace-loving," whose sons for centuries have fought the battles of foreign *condottieri* and potentates? The Swiss *Reisläufer*—a man who goes abroad to fight merely for the sake of fighting—is a historical phenomenon.

Can it even be said that a *nation* is "peace-loving"? It is an incontestable truth that in every nation the mass of the common people are peace-loving and deeply averse to aggression. But the common man is inarticulate. Those who determine the *Gestalt* of a nation organized as a state are the government, the ruling classes, the intellectuals, and not the anonymous and amorphous masses. Within the multitudinous manifestations of practically every nation there may be found streaks of militancy; war-minded individuals and even whole strata, aggressive books, philosophies, creeds. The French had their Action Française as the Germans had their Alldeutscher Verband. The question whether a nation is peace-loving cannot be objectively answered. Evidence from the general climate of public opinion may indicate a trend; but at best it will be subjective and far removed from the definiteness a legal term requires. Unless the term applied to a state, a nation, a people, is exactly defined, it will suffer the same superficial and convenient formalization as its predecessor in the Geneva Covenant—the "self-governing" state; and a self-governing state is more conceivable and provable than a peace-loving state.

However, what is logically conceivable and practically provable is the peace-mindedness—or its opposite, the aggressiveness—of a specific government in a specific state. It is comparatively easy to judge whether a government of a state is peace-loving at a given time: by its words and deeds, by what it preaches and practices. Moreover, if the government of a state is controlled by elections and parliamentary procedures the programs of the political parties operating it may be revealing. It is not the peoples that are aggressive and unmindful of the values of peace, but only their governments, or the groups which at a given time hold political power. A government which promotes and tolerates aggressive nationalism, preaches and practices militarism, extols the virtues of martial life in its propaganda and acts, does not qualify as “peace-loving.” But, under international law which governs the proposals of Dumbarton Oaks, the international security organization cannot exercise such value judgment without entering the forbidden field of the internal affairs or form of government of other nations.

#### THE SKELETON IN THE CLOSET: SOVEREIGNTY

This leads to another disappointment evoked by the Dumbarton Oaks proposals. “Peace-loving” is used (Chapter II [1]) in connection with another term which turns out to be an old acquaintance in international law: “The Organization is based on the principle of the sovereign equality of all peace-loving states.” At first sight this formula is a much desired improvement of the Geneva system. Since the international security organization is *prima facie* not based on the principle of universality—in several places the proposals refer to “states not members of the Organization”—is it the tacit assumption that there are to be two classes of states—namely, those which are peace-loving and therefore enjoy sovereign equality, and those which do not love peace and therefore are not entitled to sovereign equality? This writer at least would welcome the distinction because it would strip a non-peace-loving state of its protective cloak of sovereign equality and permit collective

intervention by the international security organization whenever its internal affairs threatened international peace.

But such jubilation is premature, as a glance at other provisions of the document will demonstrate. The United Nations is intended primarily as a security instrument: in the words of Chapter I (1), "to maintain international peace and security." Its purpose is "the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace." A commendable aim, and one which might make one condone the neglect of the new League, letting first things come first, to indicate that peace, though an aim in itself, must serve the higher aim of mankind, that is, to be free. It is further conceded that it is ascertainable, by objective standards, what technically constitutes an act of aggression, difficult as this task was found to be in the past. But what, precisely, is a "threat to peace"? For the answer one must look to Chapter VI (The Security Council) and to Chapter VIII, entitled, somewhat clumsily, Arrangements for the Maintenance of International Peace and Security, Including Prevention and Suppression of Aggression. This chapter deals with the pacific settlement of disputes between states. The gist of Section A is their ultimate settlement through the Security Council and, if justiciable—a dangerous admission that there are still international conflicts which are not accessible to judicial settlement—through the international court of justice. So far, so good. But what is offered here by the right hand is forthwith taken away by the left. That sinister provision of the Geneva Covenant—a veritable jack-in-the-box—reappears in that the machinery for the compulsory settlement of disputes "should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned."<sup>1</sup> In plain language this means that all that belongs to the internal sovereignty of the member state is still taboo for the international organization, even though the internal conditions in a country may constitute the most direct threat to peace. "Domestic jurisdiction" is merely another way to recognize the unmitigated sovereignty

of all states over what they consider to be their internal affairs. Here emerges an insoluble conflict with the new concept of the "peace-loving" state. The new Covenant does not admit—any more than the older one—that a threat to peace can arise—and that most threats to peace do arise—from the internal conditions and circumstances of a state; and even if it were admitted, the security organization can do nothing about it because these are all within the "domestic jurisdiction" "by international law." It is obvious that, in terms of the Dumbarton Oaks proposals, the form of government and the internal affairs of a nation, however "threatening" they may be to the peace of its neighbors and the world at large, can never constitute legally "a threat to peace" and become a legitimate concern of other nations "by" international law. If this interpretation is correct—and it can hardly be disputed—Section B of Chapter VIII (Determination of Threats to the Peace or Acts of Aggression and Action with Respect Thereto) narrows its scope automatically to threats to peace which actually have had international repercussions, and excludes every potential threat to peace which emanates from an autocratic or despotic government inside a country. Aggression, once more, is artificially isolated from its cause and origin—that is, the actions of an aggressive government which has succeeded in bludgeoning internal opposition into acquiescence in its aggressive intentions.

It is regrettable—and may well be tragic—that Dumbarton Oaks missed the opportunity to block both threats to peace and aggression by boldly stating that only democratic states (that is, states in which the government is answerable to the people) are eligible to membership in the United Nations. If it is true that the masses of the common people are peace-loving—and this cannot be disproved—it follows that a government controlled by the people must also be peace-loving and cannot be aggressive. If it is argued that Russia would not have consented to such a formula, the answer is that we do not know whether the Russians would have objected to it. But the world has waited—and again waited in vain—for a way

out of the vicious circle created by the irreconcilability of an international organization with internal sovereignty.

The preceding discussion demonstrates that the term "peace-loving" might easily become the pivot of the entire security system. From the start it is decidedly its most vulnerable point. The serpent of internal sovereignty, under the protective coloration of the term "peace-loving," has found a new abode in the shade of the Oaks of Dumbarton.

#### THE ECHO

It is a matter of record that the proposals of Dumbarton Oaks have nowhere evoked much popular enthusiasm—least of all among the smaller nations which were not admitted to the deliberations. This is, perhaps, due to the overlegalistic phraseology of a document devoid of any literary appeal, and to its lack of idealism and ideological courage. Emotionally the proposals have been a dud. By way of illustration take a small nation—Uruguay. The little La Plata republic, with a population hardly greater than that of Philadelphia or Los Angeles, by virtue of her democratic antecedents and the genuinely democratic climate of her people and government, can claim the respectful attention of the other nations, large and small. The government of President Amézaga was the first to present its objections against Dumbarton Oaks in the form of counter proposals. The "Fourteen Points of Uruguay" <sup>2</sup> proclaim that the new security system should serve a concrete moral aim; namely, the "dignity of the human personality." International security, thus, is an end—a most desirable one to be sure—but not an end in itself (Point II). Uruguay does not shy away from the word and the thing, democracy, which is and should be the basis of any world organization (Point XII). Nor are differences between juridical and political controversies admitted; there are no controversies which are not subject to legal and, hence, judicial settlement (Point VI). While Uruguay, with no defense of her own except the law, naturally remains averse to any kind of intervention for the sake of power politics, and therefore firmly adheres to the Pan American principle of nonin-

tervention—her government is equally averse to the principle of unlimited and illimitable sovereignty (Point VIII). But what is perhaps the most progressive approach to the crucial problem is found in Point XII:

The government of Uruguay is of the opinion that the world organization must support the system of collective security . . . by *not admitting the incorporation of nations which profess doctrines of aggression and war; violate the principles of law, justice, and liberty; and, thereby, are disposed to undermine, remove, and destroy the public peace of the world.*

*Democracy, in its opinion, is the most solid and the highest guarantee of the peaceful living-together of the peoples, and in the democratization of the international society one should recognize the most perfect system for the maintenance of peace and security. . . .*

*For this reason it is understood that the world organization should not demand of its members, prior to admission, a specific [concrete] form of government. It must, however, require of them—in the name of its ideals and the interests of all peoples attached to peace—that effective respect be paid to the essential liberties inherent in the human personality.*

In the political and moral environment of those regimes in which there exist the right of criticism and the freedom of opinion and of creed, in which . . . terror and misery do not crush the conscience, *it is next to impossible that the autocracies gain power and could lead the peoples with impunity into the bloodshedding and the destruction of a new war.* [Italics supplied.]

Thus one of the smallest and least powerful countries has the political vision to see, and the moral courage to demand, that democracy internationally, in the relations between the nations, be implemented by democracy internally, in the relations between the government and its people.

Last but not least, it is the Catholic Church, speaking through its hierarchy in the United States, which raises its powerful voice in a statement<sup>3</sup> issued by one hundred and eighteen archbishops and bishops, in favor of internal freedom as the prerequisite of international order: "A nation which refuses to accord its own people the full enjoyment of innate human rights (civil and religious) cannot be relied upon to cooperate

in the international community." And there is no organization on earth which has a more universal and profound experience in interstate relations and international rule than the Catholic Church.

#### THE SAN FRANCISCO RIDDLE

At the time of this writing the San Francisco conference has not yet completed its charter. But among the amendments to Dumbarton Oaks suggested by the "Big Four" is one which refers to the issue discussed on the preceding pages. It is proposed to delete from Chapter II (Principles), Paragraph 1, the phrase "peace-loving," so that the text would read: "The Organization is based on the principle of the sovereign equality of all states." But "peace-loving" is retained in Chapter III (Membership), Paragraph 1: "Membership of the Organization should be open to all peace-loving states." If this is to become the final text of the San Francisco Charter one would ask: How can the international security organization be based on the principle of the sovereign equality of *all* states, whether *peace-loving* or not, and yet membership be open only to all *peace-loving* states? The ancient master logicians would probably have answered: A white horse is not a horse because it is white.

#### EPILOGUE ON THE WORD AND THE FLESH

THE READER: I am one of the people who bought your book. I like the title. I read it to this point— •

THE AUTHOR: Thank you. There are not many who had your patience.

READER: Don't interrupt me. I did not interrupt you for 389 pages. Now it is my turn, before you lead me farther into the wilderness of your contradictions. I want to find out a few things, before you "ram them down my throat"—to use one of your favorite phrases. • • •

AUTHOR: You are welcome. What can I do for you?

READER: Your book is the product of a one-track mind. You are an iconoclast. You run amuck against what you call



the dogma of internal self-determination, of which nobody knows anything. I never had heard of it before I read your book. But I grant that it has something to do with those Nazi gangsters. If we had only known that they would try to do to us what they first did to their own people, we should not have objected if the British and the French and the Poles and the Czechs had marched on Berlin on February 28, 1933.

AUTHOR: Why just on that day?

READER: That was when Hindenburg signed the emergency decree suspending the fundamental rights of the German people. That was the first step of Hitler's world aggression.

AUTHOR: How do you happen to know of this date?

READER: I have it from your Hitler book; you called it the "*Magna Carta* of the concentration camp."

AUTHOR: I realize I am talking to a distinguished reader. But why did you fail to include the Americans in this Berlin picnic?

READER: We were isolationists at that time. We had no business in Berlin. Why should we? The British and the French were much closer to it.

AUTHOR: Very interesting. But now American soldiers have had to die by the thousands on the same road to Berlin. Would it not have been much cheaper—

READER: Don't confuse me with your dialectics. I concede your thesis is correct that other peoples' governments are our concern. What I wanted to say is this: You are not a real democrat. You always speak of democracy; but you do not believe in it, and you do not even wish to see it practiced. Democracy is consent and persuasion, not force and compulsion. You want to attain and to stabilize democracy by undemocratic means. What you call political tutelage is a huge undemocratic fraud because it is based on bayonets and tanks and airplanes. No respectable people would stand for it. No democratic public opinion could evolve under it, even if tutelage became "invisible" as you say. And you have admitted that not even the Germans are intrinsically bad.

AUTHOR: What is wrong with force, if I may ask? Your concepts of peace and democracy are rather old-fashioned. Almost everybody agrees now that force is evil only if used for evil purposes. Peace cannot be maintained without force. If peace has to be secured by force because some nations are not peace-loving—or, more precisely, because the governments of some nations are aggressive—why should not democracy be upheld by force if a minority in a nation dislikes it and is bent on destroying it? Only the purpose of force and the ends of compulsion vitiate its use.

READER: Is not democracy freedom to be free, or not to be free?

AUTHOR: It seems you are a good dialectician yourself. But, like most people, you confuse democracy and liberalism. Democratic reality and liberal ideology do not necessarily tally. Their historical coincidence is gratuitous and perhaps unfortunate. Liberalism, *laissez faire*, tolerance, or whatever you call the attribute of the liberal, is only an attitude and not an end in itself.

READER: You need not hammer that in. I know you are a lukewarm liberal in order to appear as an ardent democrat. I am not quarreling with you on this issue. I am tired myself of political liberalism, which lets the common people of another nation become slaves in order to sell more oil, refrigerators, and cars to its government and big business. But is not democracy likewise only a means to an end, and not an end in itself, a form, to be filled with substance—with, let us say, humanism, religion, or other spiritual values?

AUTHOR: No, here you are mistaking cause and effect for means and ends. Political democracy is an end in itself and the cause of all spiritual values, because it signifies self-realization and freedom without infringing upon similar rights of others, as liberal *laissez faire* is apt to do. In the long run political democracy cannot exist in patches and spots; it must become universally accepted. It cannot be secure when it is interspersed and interspaced with autocracy. Would you be

happy if a neighbor in your apartment house had a room full of explosives?

READER: I don't answer this one. It is too obvious. But there is something else which irritates me throughout your book. You know the gospel of St. John?

AUTHOR: In a fashion.

READER: It speaks of the word and of the flesh, that the word was made flesh, or something of that kind. It seems to me you overestimate the power of the word. You are a constitutional lawyer and rather fond—too fond, I venture to say—of the skills of your trade. A constitution is nothing but an anthology of exalted verbalisms and sanctified semantics, an empty shell, unless filled with the spirit. The best constitution on paper may not work in practice. There are scores of illustrations. The least ambitious and least dogmatic constitutions are the best and the most lasting. How can you make the word flesh?

AUTHOR: There you have hit the bull's-eye. As one who has made the study of constitutions a life pursuit, I am only too aware of the limitations of institutional arrangements and constitutional formulas. Their value is correlative to the will to abide by them and to live by and with them. But constitutions, limited as their function may be, are essential for modern states. The peoples of Europe have lived too long without a written constitution; they will need it as the tangible symbol of their liberation, as the point of crystallization for the spirit which I do hope will be a democratic spirit.

READER: I remain skeptical as to the importance of written constitutions in reconstructing Europe. You don't seem to think much of the Four Freedoms. They are hardly mentioned in the book. The common man will be satisfied only if he has freedom from want and freedom from fear, in that order. He will not care much for the other two, freedom to worship and freedom of speech. Freedom to worship, he had even under the dictators; and freedom of speech does not get him bread and jobs. But want and fear cannot be removed by a formalized constitution or by any legal arrangements, for that matter.

**AUTHOR:** You are mistaken here. Dictatorship is political power without constitutional limitations. If a constitution limits the powers of the government over its people and their use against the people, the common man need no longer have fear of his government. Where the citizens appoint their government, through democratic elections, and can throw it out when it becomes oppressive, that personal insecurity is removed on which fear, the most formidable weapon of modern totalitarianism, thrives. How much talk was there in our country about the dictatorship of our late President? But on November 8 the Sovereign spoke. Do we fear our government?

**READER:** What about freedom from want? You cannot change economic conditions by a piece of paper with highfalutin promises of social betterment.

**AUTHOR:** I agree with you that a constitution cannot create favorable economic conditions. Political democracy does ~~not~~ guarantee economic democracy. We no longer live in the climate of the naïve eighteenth century, which believed that, as soon as a people gave itself a well constructed political constitution, a happy society would emerge. But a constitution guaranteeing social rights and with power in the hands of the majority—the working people—may well attempt to change unfavorable economic conditions, remove the control of monopoly capitalism, curb the excesses of big business, redistribute the soil among free farmers, give them credits to operate their land, in short, become the legal basis of economic democracy. The law is the most effective instrument for improving economic conditions.

**READER:** I am still unconvinced that the European peoples will entertain toward constitutions the romantic, mystical attitude the British and the Americans have developed. The Europeans have had so many constitutions that they cannot possibly take a new constitution very seriously.

**AUTHOR:** This cannot be answered definitely until we know more about the European mind under the conditions of restored freedom. It may well be that the political activism which dictatorial propaganda glorified among the masses and the in-

tellectuals has captivated them, making them wholly apathetic toward the idea of a new constitution and even toward their form of government. Nor do we know how much communism, so difficult to reconcile with what we understand by political democracy, will mean to them. Misery breeds political radicalism. On the other hand, it may well be that in the long run they will rally around a constitution, if only as a symbol that arbitrariness, lawlessness, and personal insecurity have come to an end. Moreover, a constitution is always a compromise, and the art of living together is to make compromises.

READER: Since you have misgivings yourself about the chance that a new constitution would mean much to the common man, how would you propose to alleviate them?

AUTHOR: You are raising a serious problem. Rebuilding what may be called the constitutional consciousness of a people might be regarded as one phase of re-creating a general confidence in the processes of law. It requires time; and political tutelage will give this, permitting not only the incubation of democratic values which have been lost, but the consolidation of the lost sense of law. It is a problem of education—self-education if you prefer. The internal cooling-off period will help the peoples to get their bearings and to know their own mind. After all, the generation is still alive which wrote, with considerable enthusiasm and general participation of the people, the democratic constitutions of 1919 and after. People who have been commanded autocratically from above may well relish the opportunity to do their own commanding.

READER: I am going to punch another hole in your plan of political reconstruction. I fail to see the importance of your new political right. What difference does it make if a few lines are inserted into a bill of rights? Autocratic government brushes it aside together with the entire democratic constitution. Your proposal not only reflects your inveterate propensity for legal rules and institutions, but seems to me outright constitutional ventriloquism. How do you answer that?

AUTHOR: I am fully aware of it. Europe is not expected to be a political fool's paradise at once. She is about to enter

another long period of unrest, shifts, experimentation, the birth pangs of a new order. The new political right is not a magic charm which will make political democracy universal, and universally stable. It is not a recipe for the period of European hospitalization. At best it will be helpful for the convalescence of the patient. Any doctor knows that a person will recuperate faster if he is acquainted with the processes of recovery, and if his cooperation is enlisted. The political right will become fully operative only at a later stage when some modicum of democratic stability has been reached. It is, as I pointed out, a long-range proposal for political reconstruction. In the meantime the custodianship of the United Nations, or of the Anglo-American-Russian Triplice, or of the new international security organization, involves the duty to see to it that autocracy is not restored in those countries which lie in the autocratic or authoritarian danger zone. Here political tutelage has to keep the seeds of coming disaster from being sown in the new constitutions. The concept of the political right cannot be envisaged in isolation; it must be related to political tutelage and the right of collective intervention in the internal affairs of a nation in which autocracy rises again as a threat to peace. The political right is no panacea for political ills. But it may do no harm, and probably will do much good.

READER: If political democracy is "frozen," so to speak, as the exclusive form of government, will it not prevent or delay the evolution of better forms of social and political control? Would the Russians be willing to share in the exclusion of their own form of government, which they consider to be superior to political democracy?

AUTHOR: Two questions skillfully combined. As to "freezing" political democracy, I should be glad enough if it could be done. I cannot think of any better form of government, and it is capable of endless improvement and refinement. What the Soviets would do, I cannot tell. Some people would tell you that the differences between the Soviet democracy and ours are more apparent than real. We have to wait until conditions inside Soviet Russia can be studied.

READER: If it should be found that Russia is an autocracy, would not the thesis of your book require the democratic states to begin a crusade against the Soviets to eliminate it? In this sense, is not your book an open invitation to the Third World War?

AUTHOR: Speculation should be left to the radio commentators. I may be accused of being a doctrinaire, and perhaps I am. But even a doctrinaire can be enough of a realist to believe that politics is the art of the possible. Or, to put it differently, bridges should be crossed only when you reach them.

READER: You seem to take it for granted that the Anglo-American-Russian power triangle will continue in harmony and friendship as the stewards of European reconstruction. What becomes of your plan, if they fall apart? What becomes of the collective right of intervention, if Soviet Russia supports a German government which Anglo-Saxon powers consider authoritarian, or *vice versa*?

AUTHOR: Here, you have scored again. Throughout, the book has avoided playing poker politics. My plan of political reconstruction—and as yet I have not seen any plan based on a different assumption—depends on the stability of the alliance between the Anglo-Saxon nations and Soviet Russia. If this cannot be maintained over a long period of European recuperation, the history of the Grand Alliance after 1815 will repeat itself, with immensely aggravated consequences. No renovated League of Nations, no international security organization, no scheme of brotherhood of the United Nations, can be an effective substitute for the three-power configuration. This is, in the last analysis, the real message of San Francisco. I cannot think of any period of modern history in which the national interests of the three leading world powers were so identical with the interests of the world at large.

READER: What does this cryptic statement mean?

AUTHOR: American foreign policy has two basic principles which, fortunately, dovetail. One is that we must never allow a situation to develop in which the British have to choose

between us and Russia. Whatever difficulties may arise between us and the British, on land, on the sea, and in the air, they must be compromised. And we must make it easy and comfortable for the British to resign themselves gracefully to the role of junior partner in the Anglo-Saxon power combine. If they wish to assume leadership in Europe, they may do so. They know much more about Europe than we do. The other principle of American foreign policy is that we must cultivate the friendship of Russia. Under no circumstances must ideological differences make us forget the fact that the United States has fewer points of friction with Russia than with any other great power on this narrow globe. Both nations are self-contained—both, vigorous and ambitious peoples devoted to technological progress. If our relations are not disturbed by our differing ideologies, the three-cornered guardianship will provide the breathing spell which the world needs for finding its equilibrium.

READER: You envisage, then, the Anglo-American-Russian Triplice as a Holy Alliance in reverse, enforcing political democracy instead of monarchical legitimacy? Is this the intrinsic reason why you wish to see intervention restored at the expense of internal self-determination?

AUTHOR: In substance, you are not far wrong. Only you are insinuating a distortion of causality of which I am not guilty. The technical principle behind the Grand Alliance was that the affinity or homogeneity of internal forms of government in the world of European states was the prerequisite of peace. The malodorous reputation of the scheme stems from the fact that a proper principle was applied for improper purposes—namely, the suppression of liberalism and democracy. The statesmen of the time had a clear conception of “good” and “bad” forms of government which unfortunately was diametrically opposed to ours. If their principle was turned to ends of which we disapprove, it does not follow that it was wrong in itself. If our Triplice would enforce the establishment of political democracy where it does not exist, and defend it by intervention where it is threatened by autocracy, I would



not object. Democratic legitimacy seems to me to be the most worth-while war and peace aim.

READER: I was waiting for this cue. You said that the Triplice should defend political democracy against the rise of autocracy, if necessary by intervention. At least one of the Big Three, Mr. Churchill—who cannot have seen your manuscript except by extrasensory perception—seems to have swallowed its thesis hook, line, and sinker, marching his soldiers and generals against the people in Greece and Belgium, against the same people who disown their obsolete governments and wish to have men of their own in power. If the proof of the pudding is in the eating, how does this kind of intervention taste?

AUTHOR: Emotionalism in politics is little better than doctrinairism. I am afraid you miss the point. I deplore as much as you do the use of British troops against the forces of the Greek Resistance. But on the very premises of democratic legitimacy the British probably had no other choice. The fact that they fought valiantly against the Germans does not justify the Communist-inspired ELAS in short-circuiting political democracy with minority rule, which could only jeopardize the holding of normal elections. Private armies, however honorable their origin, have no place in a country aspiring to the political democracy which we must assume the majority of the Greek people wish to see. I agree with Mr. Churchill's statement to the Commons on December 8, 1944, that mob rule is not democracy. If elections are recognized as the only way of choosing a form of government, or as the best way, intervention to make them possible is not only justified—it is necessary. If intervention against the rise of autocracy is permissible, intervention against Communism—still considered in the Western world as a form of autocracy—also is permissible.

READER: But certainly Count Sforza is not a Communist. Would you defend, on the same grounds, the British government's veto against his appointment as Italian Foreign Minister in the second Bonomi cabinet?

AUTHOR: Strongly as I would support the intervention by

the British in Greece on the basis of this book, no less strongly must I condemn their attitude toward Count Sforza, who is not only a leading Italian democrat but a believer in an Italian republic. The British say that the armistice conditions imposed upon defeated Italy give the Allies the right of intervention. That may well be, and would conform with the postulate of political tutelage. But the veto against Count Sforza is inexcusable, although it may be explained by the desire of His Majesty's government to save the Italian dynasty, for ideological reasons of the affinity of the monarchical form of government.

READER: What are we going to do about it? I remember you quoted before the "Declaration on Liberated Europe" included in the Yalta Report. Yes, here it is: "When, in the opinion of the three governments, conditions in any European liberated state or any former Axis satellite state in Europe make such action necessary, they will immediately consult together on the measures necessary to discharge the joint responsibilities set forth in this declaration." Why is this sensible formula not being applied?

AUTHOR: This cross-examination should be conducted under the rules of procedure. I can testify only to what is my personal knowledge or observation. In the first place, your chronology is wrong. British intervention in Italy and Greece as well as the recognition of the Polish Provisional Government in Lublin antedated the Crimea meeting. The three statesmen devised at Yalta a rule-of-thumb solution which tried to square the circle between the British inclination toward what, rather euphemistically, they call "constitutional" governments of the liberated countries on the one hand, and the Soviet request for "friendly" governments in countries adjacent to Russia on the other. I have the impression that the formula was one of President Roosevelt's happy compromises. At any rate it went far beyond the United States' consistently pursued policy of strict nonintervention that was reaffirmed in Secretary of State Stettinius' declaration of December 5, 1944.

READER: Unless such political reticence is merely a relapse

into our old habits of isolationism, is it in the interest of the peoples of Europe, our people, and the ideals of political democracy? Was it isolationism disguised as nonintervention which made us recognize Argentina and withhold recognition from a democratic coalition government in Austria?

AUTHOR: Don't ask me. Ask the Department of State.

READER: But a Democratic Holy Alliance, or, as you style it, a Democratic International, must have its Metternich—a democratic Metternich, to be sure. Where is he? You would hardly assign this role to Churchill or Stalin?

AUTHOR: We had him. He lies in a grave in Hyde Park. As to the future I am not a prophet. All I can say is that even in democratic states those who wield power become conservative from the sheer weight of their responsibility. They are by necessity disinclined toward innovations and experimentation. The power engine of any state must run on a laid-out track; it cannot risk derailment. Those in control do not even like to change direction.

READER: I realize that the responsible statesmen are too busy to read books like yours. But what about their advisers? They rely on a huge staff of experts, professional diplomats, professors of international law, geography, and what not. Washington is full of them. After all, you should know. If you could convince them, or some of them, would it not be possible to reach those who handle the controls? Is this not the way, in our complicated age, ideas become weapons?

AUTHOR: I admire your optimism. You have the layman's deference to the experts and the technicians on the staff. Unfortunately I cannot concur. Professional diplomats? You will find fewer convinced democrats among the career Tories than might be expected in a government of the people, by the people, for the people. You do not realize the colossal ignorance of European affairs even among the experts. And you underestimate the aversion of all experts to anything new and untried. The expert is a man who knows everything about precedents. The moment he deviates from the beaten path of the precedent he is no longer an expert: he is a schemer, dreamer,

visionary—call him by what other flowering epithets come to mind. The international lawyers? To the members of the sacred guild any solution which is not sanctified by precedent is “political” and beyond the pale of the law. How much labor has been wasted on treating the war criminals under due process of law, instead of preparing a list, an ample list, of men *hors de loi*, who should have been hanged whenever and wherever they were captured. But to turn to our problem: To the vestal virgins of the law of nations, the fact that a frontal attack is directed against an accepted and uncontested doctrine of international law means only one thing: that the attacker is not an international lawyer. International law does not recognize intervention in the internal affairs of other peoples. It is not done, it is not good form. There is no precedent for it, and therefore it cannot be law. International law is the most timid and static of all branches of the science of politics. —

READER: What about historians? After all, to my lay mind the value of history seems to be that it enables the living generation to cope better with the present and the future by understanding the past.

AUTHOR: That is what you and many historians think. But history is not social engineering in reverse gear. History is not made according to plan, it just happens. There are naïve people who believe that a world war's end is like a fairy tale, the villains being punished and the good being rewarded. It does not happen that way. While in international law and diplomatic affairs the power of precedent is hard to defeat, precedent is not even recognized in history. The lessons of history are squeezed out by the force of circumstances when actual situations have to be mastered without delay.

READER: Is this a roundabout way of saying you do not believe your proposals will be accepted?

AUTHOR: Your question is pertinent. A reader has the inalienable right to be convinced that the author believes in what he proposes. If, in addition, the author succeeds in persuading his public of the soundness of his ideas, he has written a useful book. I am competent to express belief in my ideas and

proposals, but I am not competent to judge whether I have convinced my readers.

READER: So a book of a speculative nature like the one before us would constitute a valuable contribution to the subject, even if its premises and conclusions are not shared by responsible statesmen or acted on by them? If so, I am inclined to consider your book—I do not wish to hurt your feelings—a complete failure.

AUTHOR: No hard feelings on my part. I have no illusions about the practical effect of my labor. Frankly, I do not expect my suggestions to have any effect after this war. The doctrine of internal self-determination has a thick skin against which no book, however penetrating, can deliver more than a pinprick.

READER: Is not the imposition of military rule over occupied Germany, without any indigenous government, a gratifying indication that your blueprint of political tutelage is being translated into practice even before it was known to the powers that be?

AUTHOR: I wish you were right. But I remain skeptical. The dogma of internal self-determination is too deeply entrenched to be dislodged within measurable time, even though in the case of Germany sheer necessity may have caused it to be temporarily suspended. I should not be surprised at the emergence, before this book is published, of a German government with Anglo-American blessings, with exiled Weimar politicians, bourgeois democrats, politically "neutral" businessmen or experts, and one or two anti-Nazi generals—as if such a thing existed—thrown in for good measure. People like their political cocktails old-fashioned. And I do not know what kind of "friendly" government the Russians will permit to rise "spontaneously" in their zone east of the Elbe.

READER: What about the satellite states and other habitually nondemocratic countries?

AUTHOR: What is happening in Italy offers little hope on this point. I am afraid nobody, except the Russians within their sphere of influence, will bother to enjoin the oligarchic cliques to keep faith, for once, with their peoples. And among

the satellites there will be set up new "democratic" regimes, if we are lucky, under respectable and well intentioned men—but more likely controlled by turncoats, adventurers, and rogues. They will be given full faith and credit by the war-weary world, and the Aristotelian cycle will begin anew.

READER: If you are so pessimistic about the usefulness of your book in practice, why, for heaven's sake, did you ever write it? \*

AUTHOR: The question is not pertinent; it is impertinent. It goes beyond the obligations an author has toward his readers. But I shall try to answer it. Our international planners are agreed that the coming world organization will be effective only if "sovereignty is diluted." But rarely if ever are they specific on this point. The least that can be said of this book is that it is an attempt to demonstrate that sovereignty does not permit eating the cake and having it too. One cannot impose or demand restrictions on external sovereignty for the sake of an international organization and, at the same time, leave internal sovereignty in form of government intact and untouched. In all likelihood, a government based on the will of the people would be internationally minded and would consent to the requirements of international cooperation. If sovereignty, thus, were conceived as internal self-determination intelligently limited, no compulsion from outside would be called for. Before this problem can be approached, the Atlantic Charter has to be dismantled, the ax has to be wielded against the idol of internal self-determination, and the gap has to be filled with the concept of democratic legitimacy.

READER: One last question, though you will find it also impertinent. Do you relish the role of the little David with a fountain pen against the Goliath of international law and practice?

AUTHOR: I do, and I do not. To be a lonely voice crying in the wilderness is sometimes hard on the larynx. No oak is felled by one stroke, but some one has to make the first stroke. Perhaps in one hundred or in three hundred years some reader will dig out a dusty copy of this book in a public library and

proudly discover a long forgotten author who, at the end of the Second World War, anticipated a basic prerequisite of world peace which, in his time, will be as self-evident as the dogma of internal self-determination is now. Incidentally, I am not fighting quite alone. Thomas Jefferson once observed: "I do not indeed wish to see any nation have a form of government forced upon them; but if it is to be done I would rejoice at its being a free one."

READER: Jefferson knew what he was talking about. And he was a good democrat. Did he really say that, or did you make it up?

AUTHOR: Now this is the limit. Please remove your presence.

## Footnotes

### PART ONE

#### CHAPTER I

1. Whether a formal document styled "Atlantic Charter" was ever drawn up physically and signed is still a mystery. At his press conference on Dec. 19, 1944, President Roosevelt, asked whether Mr. Churchill signed the Atlantic Charter, answered that nobody had ever signed it, and that no copy of it exists. The agreement consisted of little scraps of paper with notations in the President's handwriting or jotted down by Mr. Churchill, Mr. Sumner Welles, and Sir Alexander Cadogan. These notes were given to the radio operators of U. S. S. *Augusta* and H. M. S. *Prince of Wales*. Most of the records of the *Prince of Wales* went down with her off Singapore on Dec. 10, 1941.

Phenomenologists may decide whether a thing which never has existed is real, none the less.

2. Basic objections to content and extent of Art. 3, as far as this writer was able to note, were raised only by Henry Laugier, "A Weak Point in the Atlantic Charter," *Free World*, vol. 1, pp. 568-570 (Jan., 1942). See also Emery Reves, *A Democratic Manifesto* (New York, 1943), pp. 80 ff.; *idem*, "A Challenge to the Atlantic Charter," *New York Times Magazine*, Apr. 23, 1944, pp. 9 ff. Art. 3 is criticized also by the Brazilian economist Eugenio Gudin, *Para um mundo melhor* (Rio de Janeiro and São Paulo, 1943), pp. 59 ff. For a frontal attack against Article 3 containing a succinct statement of the main thesis of the present book, see Karl Loewenstein, "The Trojan Horse," *Nation*, Aug. 26, 1944, pp. 235 ff. See also Karl Loewenstein, *Proceedings of the American Law Institute*, vol. 20 (1942-43), pp. 183 ff.

#### CHAPTER II

1. The problem is largely unexplored in the literature. For scattered observations see Ellery C. Stowell, *Intervention in International Law* (Washington, 1921)—the leading treatise in English on intervention; Paul Fauchille, *Traité de droit international*



public (8th ed. by Henry Bonfils, Paris, 1922), vol. 1, pp. 580 ff. and *passim*; William E. Lingelbach, "The Doctrine and Practice of Intervention in Europe," *Annals of the American Academy of Political and Social Science*, vol. 16 (1900), pp. 1 ff.

2. For the following discussion see, among others, Robert Redslob, "Völkerrechtliche Ideen der französischen Revolution," in *Festgabe für Otto Mayer* (Tübingen, 1916), pp. 273 ff.; Georges Scelle, *Précis de droit des gens* (Paris, 1934), vol. 2, pp. 263 ff.; Fauchille, *op. cit.*, pp. 546 ff.; Boris Mirkine-Guetzévitch, *Droit constitutionnel international* (Paris, 1933), pp. 64 ff.

3. *Moniteur Universel*, Apr. 16, 1793: "La Convention Nationale déclare au nom du Peuple Français qu'elle ne s'immiscera en aucune manière dans le gouvernement des autres puissances; mais elle déclare à même temps qu'elle s'ensevelira plutôt sous ses propres ruines que de souffrir qu'aucune puissance s'immisce dans le régime intérieur de la République, et influence la création de la constitution qu'elle veut se donner."

4. Article 119: "Le Peuple Français ne s'immisce point dans le gouvernement des autres nations, il ne souffre pas que les autres nations s'immiscent dans le sien." For text see Léon Duguit and Henry Monnier, *Les Constitutions et les principales lois politiques de la France* (5th ed., Paris, 1932), p. 78.

5. *Moniteur Universel*, Apr. 22, 1792: "Chaque nation a seule le pouvoir de se donner des lois, et le droit inaliénable de les changer à son gré."

6. See Title XIII, Art. 3, of the constitutional plan submitted to the National Convention on Feb. 15 and 16, 1793 (Year II), in Duguit and Monnier, *op. cit.*, pp. 36 ff. on p. 65: "Dans les pays occupés par les armées de la République Française, les généraux seront tenu de maintenir, par tous les moyens qui sont à leur disposition, la sûreté des personnes et des propriétés, et d'assurer aux citoyens de ces pays la jouissance entière de leurs droits naturels, civils et politiques. Ils ne pourront, sous aucun prétexte et en aucun cas, de l'autorité dont ils sont revêtus, la maintenance des usages contraires à la liberté, à l'égalité, et à la souveraineté des peuples."

7. *Moniteur Universel*, Apr. 25, 1793; Redslob, *op. cit.*, p. 286.

8. *Moniteur Universel*, Dec. 17, 1793. Even a copy of the proclamation to be published is attached to the decree.

9. The English translation used here (*Philosophical Essay on the Eternal Peace*, Boston, 1914) is by W. Hastie. See also the discussion of Kant's humanism in Hans Kohn, *The Idea of Nationalism* (New York, 1944), pp. 395 ff.

10. See *Metaphysik der Sitten* (*Philosophische Bibliothek*, vol.

42, Leipzig, 1907), pp. 184 ff. It was published shortly after the essay on the Eternal Peace, probably late in 1796 or early in 1797.

11. The following discussion lays no claim to new historical revelations. It focuses exclusively on the problem of internal self-determination and intervention. The factual material is taken from general sources. See *The Cambridge Modern History*, vol. 10, *The Restoration* (New York, 1907); Frederick B. Artz, *Reaction and Revolution* (New York, 1934); Ellery C. Stowell, *Intervention in International Law* (Washington, 1921).

12. See Guglielmo Ferrero, *The Reconstruction of Europe* (New York, 1941), and *The Principles of Power* (New York, 1942). This writer gratefully acknowledges his indebtedness to the great historian's last mentioned book, which he considers one of the essential contributions to the understanding of politics.

13. The preamble of the Four Power Treaty (Martens, *Nouveau Recueil de traités d'alliance, etc.*, vol. 2, p. 734) reveals the basis of the alliance as follows: The Kings of Prussia and Great Britain and the Emperors of Russia and Austria "considèrent que le repos de l'Europe est essentiellement lié à l'affermissement de cet ordre des choses, fondé sur le maintien de l'autorité royale et de la Charte Constitutionnelle, et veulent employer tous leurs moyens pour que la tranquillité générale . . . ne soit plus troublée de nouveau."

14. Article 6 of the Treaty of Nov. 20, 1815.

15. France's admission to the Quadruple Alliance by the Protocol of Aix-la-Chapelle of Nov. 15, 1818 (see Martens, *N. R.*, vol. 4, p. 554), is justified by the following characteristic statement (Article 3): "Que la France, associée aux autres puissances par la restauration du pouvoir monarchique, légitime, et constitutionnel, s'engage à concourir désormais au maintien et à l'affermissement d'un système, qui a donné la paix à l'Europe, et qui seule peut en assurer la durée."

16. Martens, *N. R.*, vol. 5, pp. 467 ff. The Final Act of Vienna bowed to the spirit of the period by decreeing (Art. LIV) that each member state of the federation must have a representative constitution ("*landständische Verfassung*") which, on request of the state, would be guaranteed by the federation (Art. LX).

17. *Cambridge Modern History*, vol. 10, p. 28; Stowell, *op. cit.*, p. 387.

18. Martens, *N. R.*, vol. 5, p. 644. See Karl Strupp, *Urkunden zur Geschichte des Völkerrechts* (Gotha, 1911), vol. 1, p. 166.

19. The Russian diplomat Nesselrode, in his dispatch of Jan. 31, 1821 (see Fauchille, *op. cit.*, p. 555), expressed it even more forcefully: "Les souverains sont définitivement déterminés à ne reconnaître jamais une révolution produite par le crime et qui d'un

moment à d'autre pourrait troubler la paix du monde, mais à réunir leurs efforts pour mettre un terme aux désordres aussi pénicieux qu'ils frappent directement que pleins de dangers pour les autres."

20. *British State Papers, 1820-1821*, vol. 8, pp. 1160-1162; Stowell, *op cit.*, pp. 333 ff.

21. *Völkerrechtliche Erörterung des Rechts der Europäischen Mächte in die Verfassung eines einzelnen Staats sich einzumischen* (Berlin, 1821. See Stowell, *op. cit.*, p. 511, for review of content).

22. Letter of Jan. 3, 1823, to the British Ambassador in St. Petersburg (*Cambridge Modern History*, vol. 10, p. 37). See also Canning's dispatch of Jan. 28, 1823, "We disincline for ourselves and deny for other powers the right of requiring any changes in the internal institutions of independent states, with the menace of hostile attack in case of refusal" (Strupp, *loc. cit.*) and his letter of Sept. 16, 1823, to Lord Wellesley, British ambassador in Vienna: "England is under no obligation to interfere, or to assist in interfering, in the internal concerns of independent nations. The specific engagement to interfere in France is an exception so studiously particularised as to prove the rule. The rule I take to be, that our engagements have reference wholly to the state of territorial possessions settled at the Peace; to the state of affairs between nation and nation; not (with the single exception above stated) to the affairs of any nation within itself."

23. Illustrations are: Portugal, 1826 and 1834; Italy, 1847; Spain, 1848; Naples, 1856; and, in the second half of the century, the Boer republics—in this case, however, with the expiatory sequence that the defeated enemy was granted, within five years (1907), full internal self-determination as a Dominion of the British Commonwealth.

24. For its text see Samuel Flagg Bemis, *A Diplomatic History of the United States* (New York, 1966), pp. 210 f. A survey of the vast literature is found in L. Oppenheim, *International Law* (5th ed. by H. Lauterpacht, London, 1937), vol. 1, p. 257.

25. The changed attitude is well reflected by Lamartine in 1848 concerning France's support for the liberal movement in Italy (see Fauchille, *op. cit.*, p. 557): "Si les états indépendants de l'Italie étaient envahis, ou si l'on imposait des limites ou des obstacles à leurs transformations intérieures . . . la République Française se croirait en droit d'armer pour protéger ces mouvements légitimes de croissance et de nationalité des peuples."

26. In England, H. Wheaton's *Elements of International Law*—published first in 1836, and ever since one of the most influential treatises—seems to have taken the lead, followed by Hall,

Halleck, Lawrence, John Stuart Mill, down to Phillimore, Oppenheim, and Brierley.

27. *Das Recht der Einmischung in die inneren Angelegenheiten eines fremden Staats, vom vernunftrechtlichen, historischen und politischen Standpunkt* (Freiburg, 1845).

28. See for example Deputy Ruge, in the National Assembly of Frankfort, *Stenographische Berichte*, vol. 2, pp. 1048 ff.

29. Fauchille, *op. cit.*, p. 557.

30. Georges Scelle (of Geneva), *op. cit.*, vol. 1 (Paris, 1932), p. 63, writes: "Avec la théorie de l'Etat souverain, il est logiquement impossible de fonder l'intervention. Un gouvernement ne saurait substituer sa conception de ce qui est juridique ou conforme à la règle des compétences, à la conception d'un autre gouvernement. . . . La doctrine traditionnelle a donc longtemps repoussé la légitimité de l'intervention." p. 85: "Le Droit des gens admet communément, en effet, que toute collectivité étatique peut se donner le gouvernement qu'elle préfère, et choisir tout système juridique compatible avec l'entretien des relations internationales." Paul Fauchille, *op. cit.*, p. 579 (under the heading, "Intervention in Internal Politics"), "Les mouvements intérieurs qui se produisent au sein d'un Etat ne peuvent être comprimés par les états voisins, tant qu'ils ne s'étendent pas au delà des frontières"; p. 432: "Tout Etat, en vertu de la souveraineté intérieure dont il jouit, doit avoir le pouvoir de choisir à son gré son organisation politique, de fixer la forme de son gouvernement et le caractère de sa constitution, d'être une monarchie absolue ou constitutionnelle, une république unitaire comme la France, ou fédérale comme les Etats Unis, une république aristocratique comme le fût celle de Venise, ou démocratique comme celle de Suisse et de France,—de modifier cette constitution ou de la remplacer par une nouvelle,—de fixer les pouvoirs et les attributions du Chef de l'Etat,—de leur conférer tels titres ou distinctions honorifiques, sauf la faculté pour les autres Etats de ne pas les reconnaître." See also pp. 338 ff. Franz von Liszt, who dominated the science of international public law in Germany until the advent of the Nazis, wrote in *Das Völkerrecht* (12th ed. by Max Fleischmann, Berlin, 1925), p. 128, "Die innere Selbständigkeit der Staatsgewalt äussert sich allen übrigen Staaten gegenüber als Autonomie in Gesetzgebung, Rechtspflege, Verwaltung innerhalb des dem Staate zustehenden Machtkreises"; p. 119, "Völkerrechtswidrig ist die Intervention, d.h. die autoritative Einmischung in die äusseren oder inneren Angelegenheiten eines andern Staates." Charles G. Fenwick, noted American specialist in the law of nations in *International Law* (2nd ed., New York, 1934), p. 147: "In pursuance of this right [*sc.* internal

independence] a state may organize its government in any manner which is most satisfactory to it; it may change from a monarchical to a republican system and vice versa, as its own judgment may dictate; it may regulate the personal and property rights of its citizens as it believes to be best for the general welfare." Stowell (*op. cit.*, p. 150, under the heading, "Constitutionalism") writes: "Intervention to prevent injustice cannot legally be made a ground for interfering in the internal political affairs of an independent state to establish representative institutions or any other form of constitution or government. However morally justifiable interference for such a purpose may be, it remains an act of policy and must be defended as such." He adds (p. 154): "What is politics to-day may become the law of to-morrow, but as yet there is under international law no right of intervention to foster or to impose representative institutions." Finally, L. Oppenheim in his *International Law* (5th ed. by H. Lauterpacht, London, 1937), considered by many to be the most authoritative treatise on international law existing, treats internal autonomy as one of the essential facets of state sovereignty (vol. 1, pp. 233 ff.), granting the state complete liberty of action within its borders and supreme authority over all persons and things within its territory (territorial supremacy) and over all its citizens at home and abroad (personal supremacy). "Independence and territorial as well as personal supremacy," he continues, "are . . . recognised and therefore protected qualities of States as International Persons. . . . In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it likes, arrange its administration in a way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. . . . In consequence of its personal supremacy, a State can treat its subjects according to discretion. So long as International Law provides no remedies against abuses of governmental power, international society cannot be regarded as an institution for the mutual insurance of established Governments" (p. 238). Oppenheim-Lauterpacht records (p. 240) that international law goes to such lengths of respect of internal sovereignty that it prevents other governments from criticizing foreign governmental institutions: "The principles of independence and non-intervention enjoin upon Governments and State officials the duty of scrupulous abstention not only from active interference, but from criticism of foreign laws and institutions"—an assumption which would make President Roosevelt and other "prematurely antifascist" officials of the United States government violators of international law. Consequently, intervention is strictly prohibited.

"The duty of every State itself to abstain, and to prevent its agents and, in certain cases, subjects, from committing any act which constitutes a violation of another State's independence or territorial or personal supremacy is correlative to the corresponding right possessed by other States" (p. 235). "That intervention is, as a rule, forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt" (p. 249). "Wherever there is no right of intervention, an intervention violates either the external independence or the territorial or the personal supremacy" (p. 250).

31. Published in *American Journal of International Law*, vol. 38 (1944), Official Documents section, pp. 41-139. See also Josef L. Kunz, "The International Law of the Future," *American Political Science Review*, vol. 38 (1944), pp. 354 ff., 359.

32. For a selected list see Fauchille, *op. cit.*, pp. 546 ff. Only for the sake of illustration some major cases may be cited here: Greece (1827 and repeatedly thereafter); Portugal (1826, 1834); Hungary (1848); China (1900 and after); the La Plata region (1847). The most frequently intervened areas were the Ottoman realm and the Balkans (1840, 1854, 1877, 1886, 1897, 1912, and after) and the Central American and Caribbean states, among which Mexico proved a particular target (1861-1867, 1911-1921). A most consequential intervention was that of Napoleon III in Italy (1859).

33. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, p. 253 n. 3, and p. 279.

34. See Charles Dupuis, *Le Principe d'équilibre et le Concert Européen* (Paris, 1909), p. 308. One may disregard isolated instances pointing in this direction such as the British intervention in Portugal in 1834, when Palmerston claimed (see Stowell, *op. cit.*, p. 150 n. 70) to have decided "on an act of forcible interference for the purpose of giving those countries the blessing of constitutional government."

35. The Mexican intervention started conventionally enough as a collective undertaking of England, France, and Spain for the collection of debts. But the enthronement of Maximilian of Austria was a scheme of Napoleon's imperialism which the Mexicans, once the United States had extricated itself from the Civil War, were able to liquidate in line with the doctrine that other peoples' government is their own business. Despite Albert L. Guérard's brilliant reinterpretation of the Mexican undertaking (in his *Napoleon III*, Cambridge, 1943, pp. 219 ff.), the popular oversimplification seems closer to the truth than the assertion that the Mexican adventure was "the deepest thought of the reign." The crux of the matter was that the Mexican people and intellectuals

did not want a monarchy—least of all, its outlandish version. See Guérard, *op. cit.*, p. 234: "The great argument of the monarchists was that there existed in their country a vast majority eager to support a sovereign. This claim was to be proven so utterly false that we wonder how the head of a great state could ever have been deceived by it."

36. See Stowell, *op. cit.*, pp. 51-276; Fauchille, *op. cit.*, pp. 571 ff.; Stowell, "Intercession Against the Persecution of Jews," *American Journal of International Law*, vol. 30 (1936), pp. 102-106; Scelle, *op. cit.*, vol. II, pp. 50 ff.; Oppenheim-Lauterpacht, *op. cit.*, p. 253.

37. Stowell, *Intervention in International Law*, p. 53.

38. In 1901 the United States addressed a note to the signatory powers of the Treaty of Berlin suggesting to them to intervene against repressive anti-Semitic legislation in Rumania (Fauchille, *op. cit.*, p. 573. See also Bernard Hamblen, *L'Histoire des israélites roumains et le droit de l'intervention*, Paris, 1913.) Pogroms in Kischinev in (Russian) Bessarabia in 1903 did not even lead to an official diplomatic step on the part of the United States but only to a transmittal to the Russian government of a public protest of the Protestant clergy (Fauchille, *op. cit.*, p. 537).<sup>4</sup> When, in 1856, the Conference of Paris protested, at the instance of England and France, against political arrests in the Kingdom of the Two Sicilies, Lord Clarendon claimed the right of intervention in deviation from the British tradition of abstinence. He conveyed to the King of Naples the wish of the conference "to ameliorate his system of government, to amnesty persons convicted for political crimes or detained without trial." Seemingly the Western powers at that time had more moral courage than in 1933. British and French naval squadrons were held ready to evacuate their nationals, after the King had rejected such intervention. Russia protested vigorously, holding that despotism in Naples, in so far as it did not affect the position of foreigners, was an internal affair of the King and his subjects (see Fauchille, *op. cit.*, pp. 556 ff., 580).

39. See Fauchille, *op. cit.*, p. 574.

40. See the classical letter of resignation of James G. McDonald as High Commissioner for Refugees (*New York Times*, Dec. 30, 1935).

41. How deep-rooted is the deference of the professional custodians of the law of nations toward the dogma of internal self-determination is strikingly demonstrated by the group which wrote recently "The International Law of the Future" (see *supra*, p. 31). The comment (pp. 74-76) refers to slavery, religious freedom, protection of minorities and labor standards; but the members of

that illustrious group hold the principle of internal self-determination in such esteem that they carefully refrain from calling a spade a spade. The only illustration they were able to dig up is the decimation of the African tribe of Herreros by German colonial imperialism, which is dutifully denounced. But the Nazi outrages against Jews, Poles, Czechs, Greeks and all the other slave nations are glossed over with the enviously tempered phrase: "The enunciation of this Principle seems particularly important at the present time, when shocking efforts are being made in more than one part of the world to exterminate whole groups of human beings." If this is to be the "international law of the future," the future is lawless indeed.

42. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, pp. 251 ff.; Stowell, *op. cit.*, pp. 438 ff.

43. See the material in Fauchille, *op. cit.*, pp. 663 ff.

44. This subject is treated comprehensively by Boris Mirkine-Guetzévitch, *Droit Constitutionnel International* (Paris, 1933), seemingly the only existing monograph. The book contains much valuable material which no writer with similar topical interests would neglect without loss. But it is marred by superficiality, inaccuracies, and a superlegalistic approach.

45. See Travers Tywiss, *The Law of Nations, Considered As Independent Political Communities* (Oxford, 1863), vol. 1, pp. 367-379.

46. Protocol of London of Feb. 3, 1830, and Convention of London of May 7, 1832 (see Fauchille, *op. cit.*, p. 663).

47. Treaty of London of July 13, 1863, Art. 6 (Martens, *Nouveau Recueil Général*, vol. 16, pt. 2, p. 79). See Oppenheim-Lauterpacht, *op. cit.*, p. 252 n. 4 and p. 764 n. 5.

48. See Martens, *N. R. G.*, 2nd supp., vol. 3, pp. 449 ff.

49. See Law of Aug. 14, 1884, Art. 2 (modifying Law of Feb. 25, 1875, Art. 8), excluding the members of the formerly reigning families from the presidency of the Republic.

50. See Law no. 47 of Nov. 6, 1921; see F. R. Dareste and P. Dareste, *Les Constitutions modernes*, ed. by Joseph Delpéch and Julien Laferrière (Paris, 1928), vol. 2, p. 37.

51. *Cuba*: Treaty of Habana of May 22, 1903 (see Oppenheim-Lauterpacht, *op. cit.*, p. 254 n. 1), Art. 3: "The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty." *Panamá*: Treaty of Washington of Nov. 18, 1903 (see Oppenheim-Lauterpacht, *op. cit.*, p. 252 n. 3), Art. 7: "The same right and authority are granted to the



United States for the maintenance of public order in the cities of Panamá and Colón, and the territories and harbors adjacent thereto, in case the Republic of Panama should not, in the judgment of the United States, be able to maintain such order." *Haiti: Treaty of Port-au-Prince of Sept. 16, 1915, Art. 14* (see Oppenheim-Lauterpacht, *op. cit.*, p. 764 n. 5). The so-called Platt Amendment was voted by the U.S. Congress Mar. 2, 1901, and accepted by the Cuban National Assembly on June 7, 1901, which added to the Cuban Constitution of Feb. 21, 1901, the following clause: "Cuba will never renounce its independence or permit another state to establish itself on Cuban territory. The government will never contract a debt whose services are not guaranteed by its current revenues." The Platt Amendment was formally repealed by Treaty of May 29, 1934 (Oppenheim-Lauterpacht, *op. cit.*, p. 252 n. 2). See also Art. 136 of the Constitution of Panamá of Feb. 13, 1904 (Dareste, *op. cit.*, vol. 4, p. 269), which incorporated the guaranteed provisions of the treaty into the internal constitutional law. It may be mentioned that the Act of Congress of Mar. 24, 1934 (48 Stat. at L., 456), granting independence to the Philippines, contains in sec. 14 a similar clause of guarantee and eventual intervention (see Oppenheim-Lauterpacht, *op. cit.*, p. 252 n. 3). To this group belongs also the request of the government of Nicaragua, addressed to the United States in 1927, to supervise free and impartial elections in that country (see *American Journal of International Law*, vol. 22 (1928), Supp., pp. 128 ff.). Elections in the Dominican Republic also were policed by U.S. troops.

52. "No state may intervene in the internal or external affairs of another" (Montevideo, 1933, Convention on Rights and Duties of States, Art. 8; Buenos Aires, 1936, Additional Protocol Relative to Nonintervention; Lima, 1938, Declaration of American Principles). See also, "Inter-American Juridical Committee: Reaffirmation of Fundamental Principles of International Law," issued at Rio de Janeiro, June 2, 1942, and reprinted in *American Journal of International Law*, vol. 37 (1943), Supp., pp. 21-24: "Respect by each State for the personality, sovereignty and independence of every other State constitutes the basis of international order, just as in the relations of individuals mutual respect constitutes the essence of democracy. Hence no State may interfere in the internal or external affairs of another." This committee had gone on record with the same articularization of strict nonintervention as early as 1927. See Art. 3 of the Proposals of the committee, reprinted in *American Journal of International Law*, vol. 22 (1928), Supp., pp. 234 ff.: "No State may intervene in the internal affairs of another." And Art. 5: "The political existence of the State is independent

of its recognition by other States. Even before recognition the State has the right . . . to adopt whatever organization it considers proper, to legislate concerning its own interests . . ." Inter-American Conferences on Problems of War and Peace of Mexico City, Final Act of Mar. 8, 1945, Resolution XI, Sec. 3: "Each State is free and sovereign, and no State may intervene in the internal or external affairs of another." See also the emphasis on nonintervention as an established principle of Pan American international law in the preamble of Resolution VIII ("Act of Chapultepec").

53. A vast literature has accumulated around the problem. See Oppenheim-Lauterpacht, *op cit.*, vol. 1, pp. 128-130; John Bassett Moore, "Constitutional and International Law Principles Involved in the Recognition of New States and Governments," *American Journal of International Law*, vol. 27 (1933), pp. 615 ff.; Ellery C. Stowell, "The Doctrine of Constitutional Legitimacy," *American Journal of International Law*, vol. 25 (1931), pp. 302-306; Josef L. Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Stuttgart, 1928).

54. See Arts. 5, 27, 35, 44 (Oppenheim-Lauterpacht, *op cit.*, pp. 124, 242).

55. See Oppenheim-Lauterpacht, *op cit.*, p. 128.

56. See Oppenheim-Lauterpacht, *op cit.*, pp. 130-131: "In the absence of effective international guarantees for securing just government and proper administration of the law within the various States it is impossible to insist on the perpetuation of any existing regime by a refusal to recognize its revolutionary successor."

57. It was announced by Secretary of State Stimson on Jan. 7, 1932, in connection with the illegal seizure of the Chinese province of Manchuria by Japan, in violation of the Kellogg-Briand Pact (Treaty of Paris of Aug. 27, 1928); see Oppenheim-Lauterpacht, *op cit.*, p. 140; see also the corresponding Resolution of the Assembly of the League of Nations of Mar. 11, 1932, *Journal Officiel*, Special Supplement nr. 101, p. 8; see Oppenheim-Lauterpacht, *op cit.*, p. 141.

58. On the Wilson Doctrine see John Bassett Moore, *The Principles of American Diplomacy* (New York, 1918), pp. 406 ff.; Fauchille, *op cit.*, p. 608.

59. On the Tobar Doctrine see Leonidas García, "Estudios sobre la doctrina Tobar," in *Trabajos de la VI Sección del Primer Congreso Científico Pan-Americano de 1908*, vol. 20, p. 326; also Fauchille, *op cit.*, p. 633; Oppenheim-Lauterpacht, *op cit.*, p. 130 n. 1; Scelle, *op cit.*, vol. 1, p. 117; Mirkine-Guetzévitch, *op cit.*, pp. 42, 68.

60. See the following passages from Secretary of State Bryan's

circular note to certain American missions of Nov. 7, 1913: "The President feels . . . that he ought . . . to make known to the government to which you are accredited, his clear judgment that it is his immediate duty to require Huerta's retirement from the Mexican government, and that the Government of the United States must now proceed to employ such means as may be necessary to secure this result. That, furthermore, the Government of the United States will not regard as binding upon the people of Mexico anything done by Huerta since his assumption of dictatorial powers, nor anything that may be done by the fraudulent Legislature which he is about to convoke" (quoted in Stowell, *op. cit.*, p. 151).

61. Stowell, *op. cit.*, p. 152.

62. For text, see *Amer. Jour. of International Law*, vol. 17 (1923), Supp. p. 121. See also Lester H. Woolsey on the recognition of a revolutionary government in El Salvador, *Amer. Jour. of International Law*, vol. 28 (1934), pp. 325 ff.; Mirkine-Guetzévitch, *op. cit.*, pp. 42 ff.

63. See Fauchille, *op. cit.*, p. 634.

64. "*Les Gouvernements des Hautes Parties Contractantes ne reconnaîtront aucun gouvernement qui viendrait à s'établir dans l'une quelconque des cinq républiques à la suite d'un coup d'état ou d'une révolution contre un gouvernement reconnu, tant que la représentation du peuple, librement élue, n'aura pas réorganisé le pays dans une form constitutionnelle.*"

65. According to Andrés María Lazcano y Mazón (*Constituciones políticas de América*, Habana, 1942, vol. 1, p. 27), sixteen of the twenty Latin-American republics prohibit reelection.

66. See Karl Loewenstein, *Brazil Under Vargas* (New York, 1942), pp. 53 ff.

67. More recently the democratic elements in some Latin-American states seem to be doing their own housecleaning, and a number of entrenched dictatorships have been removed in 1944 (Guatemala, El Salvador, and Ecuador).

68. On the other hand the so-called Estrada Doctrine of 1930 (Oppenheim-Lauterpacht, *op. cit.*, p. 130 n. 1), insists on the duty of maintaining diplomatic relations with revolutionary governments even though they may have come into power unconstitutionally. The doctrine was invoked in connection with the denial of recognition to Bolivia in 1943-1944. On the Estrada Doctrine, see Philip C. Jessup, *Amer. Jour. of International Law*, vol. 25 (1931), pp. 719-723; Instituto Americano de Derecho y Legislación Comparada, *La Opinión universal sobre la Doctrina Estrada* (Mexico City, 1931); Josef L. Kunz, "The Position of Argentina," *Amer. Jour. of International Law*, vol. 38 (1944), pp. 436 ff. Sumner

Welles's vigorous defense of the Estrada Doctrine (*The Time for Decision*, New York, 1944, pp. 199, 237) appears rather unconvincing. In recent days when nonrecognition of Argentina<sup>a</sup> had grown into the crucial issue of inter-American relations, there was wide discussion in some Latin-American states of the plan to make recognition of a revolutionary government positively dependent on its willingness to hold elections or a plebiscite within ninety days after its seizure of power, letting the people decide on the new government. In this form the scheme may seem unworkable. Unless such elections are internationally supervised, almost any government south of the Rio Grande—controlling the administrative machine and the organs of public opinion—could easily "swing" the election as it pleased. But the fact that in Latin America, preoccupied with the concept of unabridged internal sovereignty and continually fearing intervention, the discussion on anything similar to the Tobar Doctrine has been reopened indicates clearly a slow revision of Latin-American thinking about the taboo of internal sovereignty.

69. The Resolution reads (see press release no. 534<sup>b</sup> of the Department of State, Dec. 27, 1943): "To recommend to the American governments which have declared war on the Axis powers or have broken relations with them, that *for the duration of the present world conflict* they do not proceed to the recognition of a new government *instituted by force*, before consulting among themselves for the purpose of determining whether this government complies with the Pan-American undertakings for the defense of the continent, nor before carrying out an exchange of information as to the *circumstances which have determined the establishment of said government*." (Italics supplied.) See also Charles G. Fenwick, "The Recognition of New Governments Instituted by Force," *Amer. Jour. of International Law*, vol. 38 (1944), pp. 448-452.

70. See the committee's second annual report (published in Nov., 1944, in Montevideo), *Segundo Informe anual sometido a los gobiernos de las repúblicas americanas*, p. 106.

71. *Ibid.*, p. 27 (transl. from the Spanish).

72. *Ibid.*, pp. 96 ff.

73. *Ibid.*, p. 103 (transl. from the Spanish).

### CHAPTER III

1. See addresses of May 27, 1916; Jan. 22, 1917; Jan. 8, 1918; Mount Vernon speech of July 4, 1918.

2. See address of Sept. 11, 1919, Billings, Mont.

3. It may be noted here in passing that American public opin-

ion during the First World War had built up a wholly erroneous conception of Germany's system of government. Germany-Prussia was depicted as a tyranny, constructed in the spirit of Treitschke who in turn was unduly oversimplified as rabid nationalist and worshiper of lawless power (for a fairer appraisal of Treitschke see Friedrich Meinecke, *Die Idee der Staatsraison*, Munich-Berlin, 1924, pp. 488 ff.). Much of this was useful war propaganda, much also sheer ignorance. In reality Germany under the Empire, though a constitutional monarchy of the Central European type which present-day more refined political terminology would classify as "authoritarian" (for a typological definition of terms, see K. Loewenstein, *Brazil Under Vargas*, New York, 1942, pp. 369 ff.), was, aside from the war situation, far from being an "autocracy" or a "despotism" or a dictatorship. On the contrary, German administration was governed fully by the rule of law ("*Rechtsstaat*"), and civil liberties were at least as well protected as in Italy or France.

4. Jacob Robinson and others, *Were the Minority Treaties a Failure?* (New York, 1943), p. 31: "This clause was interpreted to mean only 'full control of its internal affairs and its own foreign relations,' rather than 'full control of the government by the people.'" The conflict between internal sovereignty of states and the necessity of limiting by international obligations was well realized by Orlando (see Robinson, *op. cit.*, p. 33); but his compromise formula of "self-restraint" and "the spontaneous influence of world public opinion on the individual state" was obviously an escape into semantics.

5. See Mirkine-Guetzévitch, *op. cit.*, p. 83. It reads: Les nations constituées en état et pourvues d'institutions représentatives permettant de les considérer comme responsables des actes de leur propre gouvernement." This implied, through the existence of representative institutions, responsibility of the government to the people. For one of the few authors who interpreted Art. 1 in the sense of making constitutional government mandatory, see Scelle, *op. cit.*, vol. 1, p. 119: "Ce qui comporte évidemment la constitutionnalisation du pouvoir et non seulement son effectivité." Likewise Walter Schücking, "Le Développement du Pacte de la Société des Nations," Académie de droit international, *Recueil des cours*, vol. 20 (1927), pp. 359 ff., holds that, according to the interpretation of the Assembly, only states with a democratic structure should be members of the League. This, however, would not exclude those with monarchical institutions. See also *Actes de la Quatrième Assemblée, Compte-rendu des débats*, 1923, pp. 125 ff.

6. Among these were: Is the applying state one with a stable government and settled frontiers? Is it fully self-governing, that is,

free from outside control? See Oppenheim-Lauterpacht, *op cit.*, vol. 1, p. 304, n. 1.

7. The British in 1925 opposed Ethiopia's admission, which was sponsored, of all states, by Italy. The only condition of admission required was the abolition of slavery, whose continuation later served as an official pretext of Italy's attack on the fellow member although fascism had produced inside Italy conditions not dissimilar to those prevailing in Ethiopia. On the spurious constitution "granted" by Haile Selassie in 1931, see *Annuaire de l'Institut du Droit Public* (Paris, 1932), pp. 578 ff.

8. See Mirkine-Guetzévitch, *op. cit.*, pp. 84 ff., and Daresté-Delpech-Laferrère, *op. cit.*, vol. 2, pp. 4 ff. The issue of the Habsburg restoration as impediment to admission had arisen, at the insistence of Czechoslovakia, Yugoslavia, and Rumania, as early as in 1920 (see Declaration of the Conference of Ambassadors of Feb. 2, 1920). Hungary concluded the peace treaty of Trianon June 4, 1920. Subsequently ex-Kaiser Karl (King Károly IV in Hungary) made two unsuccessful attempts to restore himself to the throne (Mar. 27 and Oct. 21, 1921). After the first attempt the National Assembly under threat of armed intervention by the succession states (except Austria), voted against restoration. After the government of Count Bethlen had turned back the second attempt by armed force, the National Assembly enacted the Dethronement Act (Law no. 47 of Nov. 6, 1921, Daresté-Delpech-Laferrère, *op. cit.*, p. 37). On the constitutional situation in Hungary in general see *infra*, pp. 253 ff.

9. See Oppenheim-Lauterpacht, *op cit.*, p. 325, and the British Official Commentary (Cmd. 151, pub. 1919), which explicitly denied that the guarantee of Art. 10 could be used for internal purposes of the member states.

10. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, p. 324, n. 1, and vol. 2, pp. 94 ff. See also Louis Le Fur, "Règles générales du droit de la paix," *Académie de Droit International de la Haye, Recueil des Cours*, vol. 54 (1935), pp. 272-303. Mariotte, *Les Limites actuelles de la compétence de la Société des Nations* (Art. 15, secs. 7-8 of the Pact), Paris, 1926.

11. For a summary of the internal restrictions on Germany see Fauchille, *op cit.*, vol. 1, pp. 665 ff.

12. From the beginning this clear and unequivocal statement assigning superiority to the Versailles Treaty over the constitution was whittled away even by the liberals among the German constitutional lawyers (see the standard treatise of Gerhard Anschütz, *Die Verfassung des Deutschen Reichs*, 4th ed., Berlin, 1933, p. 763, with literature in n. 1). The most that was conceded

was that, as long as the treaty was in force, provisions of the Weimar constitution that were in conflict with it were to be considered as "in abeyance" (*ruhen* is Anschütz's word). Provisions at variance with the treaty were "temporarily invalid" (*hemmen*), but by no means null and void (see Deputy Haussmann, one of the leading members of the Democratic party, in the plenary sessions of the Reichstag, p. 1830, C and D). In so far as such provisions referred to temporary solutions of the peace treaty, including the Saar territory, this interpretation may have been justified. But the peace treaty was to be in force for an indefinite period, or at least until it was multilaterally modified or repealed; therefore it is elementary constitutional logic that provisions of the constitution which conflicted with the treaty had no legality under that constitution; and by no stretch of imagination could they be considered as only "temporarily inapplicable." Intellectual sabotage of the treaty started in republican Germany the very moment the treaty was signed.

The Dawes plan (London Protocol of Aug., 1924) imposed further restrictions on Germany's internal self-determination (Aug., 1924), placing the administration of the German railroads under a mild foreign control in order to guarantee the loan to Germany. Legal changes of the constitution required by it were accomplished by the German Railroad Act (*Reichsbahngesetz* of Aug. 30, 1924—*Reichsgesetzblatt*, pt. II, pp. 212 ff.), which was passed by the majorities prescribed for a constitutional amendment (see Anschütz, *op. cit.*, p. 449). It may be argued that such encroachments on German internal sovereignty were agreed upon by international treaty. This is formally correct; but the fact remains that they were the consequence of intensified foreign control. Of their own volition the Germans never would have consented to pledge the railroad property as security for the loan, although they would have gladly taken the loan without any guarantees.<sup>13</sup>

13. The sabotage of the treaty by legal interpretation, mentioned in the preceding note, is illustrated in a particularly pertinent way by the problem of the Austrian *Anschluss*. Art. 61, sec. 2, of the Weimar constitution accorded to Austria the right to participate in the German Federal Council after *Anschluss*, in proportion to her population. In view of the prohibition of *Anschluss* by the treaties of Versailles and Saint-Germain-en-Laye the article was considered "inexecutable" (*nicht vollziehbar*—see Anschütz, *op. cit.*, p. 340). But the National Assembly found it inopportune to admit that fact frankly. Only after the constitution had come into force (Aug. 11, 1919) did the Allied Powers officially object to the veiled inclusion of Austria within Germany,

in a note of Sept. 2, 1919, demanding that the palpably illegal provision be stricken from its text and announcing reprisals in case of noncompliance. On Sept. 8, the Reich government under President Ebert yielded. A joint declaration was signed at Versailles September 22, in which Germany explicitly recognized the "invalidity" (*Ungültigkeit*) of the provision unless the Council of the League of Nations assented to a change in the status of Austria. The German government promised that the competent German legislative bodies would ratify this declaration within fourteen days after the Versailles Treaty entered into force (Jan. 10, 1920—for the text of the declaration see Walter Jellinek, *Jahrbuch des öffentlichen Rechts*, vol. 9 [1920], p. 104). But the victorious powers were either too negligent or too ignorant of German constitutional law to follow up effectively. The declaration was accepted by the National Assembly (Anschütz, *op. cit.*, pp. 340-341), but was never officially recorded in the official bulletin (*Reichsgesetzblatt*), an indispensable formality for validating the procedure (see Weimar constitution, Arts. 70, 71). Triumphant Anschütz states that the prohibition of *Anschluss* was never formally translated into positive law and, therefore, the objectionable article of the constitution had retained its validity.

14. Oppenheim-Lauterpacht, *op. cit.*, p. 568.

15. Of the immense literature on the subject only the following sources may be given: Oppenheim-Lauterpacht, *op. cit.*, vol. 1, pp. 568 ff.; Scelle, *op. cit.*, vol. 1, pp. 187 ff.; Fauchille, *op. cit.*, vol. 1, pp. 802 ff.; Mirkine-Guetzévitch, *op. cit.*, pp. 178 ff.; C. A. Macartney, *National States and National Minorities* (London, 1933); André N. Mandelstam, *La Protection des minorités en droit international* (Paris, 1931); Jacob Robinson, *op. cit.*; M. Ruckser, *La Protection des minorités en droit interne* (Les Minorités Nationales), Paris, 1931; Nathan Feinberg, "La Jurisdiction et la jurisprudence de la Cour Permanente de Justice Internationale en matière des mandats et des minorités," *Académie de Droit International, Recueil des Cours*, vol. 59 (1937), pp. 591 ff.

16. Turkey was enjoined by Art. 145 of the Treaty of Sèvres to submit to the powers a draft of an electoral law granting proportional representation to its ethnical minorities.

17. Enumerated by Scelle, *op. cit.*, vol. 1, p. 196, n. 1.

18. In Austria this was accomplished by inserting the apposite provisions of the Treaty of Saint-Germain *in toto* into the constitution. Other states gained the same objective by including minority protection provisions, without explicit reference to international obligations, in their bills of rights, e.g., the Polish Constitution of Mar. 17, 1921, Arts. 109-111, 115.



19. See Mirkine-Guetzévitch, *op. cit.*, p. 182.

20. For the following see Robinson, *op. cit.*, pp. 175 ff.

21. It was the authoritarian government of Poland which, on Sept. 13, 1934, repudiated the international supervision of the provisions protecting minorities (see on this move Robinson, *op. cit.*, pp. 178 ff.)—an act which amounted to a denunciation of the international obligations because no foreign minority could expect to find justice either by internal legislation or before municipal courts (see Oppenheim-Lauterpacht, *op. cit.*, vol. 1, p. 570, n. 4). On the other hand, the bilateral convention between Poland and Germany of May 22, 1922, concerning Upper Silesia gave complete satisfaction for fifteen years, because under the Third Reich, succeeding the Weimar republic, both parties were identically interested in removing frictions between them. The treaty even protected Polish Jews in Upper Silesia against Hitler's anti-Semitic legislation. Its expiration (1937) served Hitler as welcome pretext for complaining about persecution of the *Volksdeutsche* in Poland when in 1939 he set out to attack Poland.

22. The situation in Syria and Lebanon, under French mandate, indicates some parallels in the control of internal autonomy (see Mirkine-Guetzévitch, *op. cit.*, p. 90, also Hans Kohn, "Die staats- und verfassungsrechtliche Entwicklung der Republic Libanon," *Jahrbuch des öffentlichen Rechts*, vol. 18 (1930), pp. 386 ff.). In 1943 the parliament of Lebanon changed the constitution of the republic without authorization or even consultation of the Mandate Power France, represented by the French Committee of National Liberation, which, confronted by the Atlantic Charter, had to acquiesce. In 1945 both territories obtained full recognition as independent states and participated as such in the San Francisco Conference.

23. See Scelle, *op. cit.*, vol. 2, pp. 284 ff.; Oppenheim-Lauterpacht, *op. cit.*, p. 356, n. 2; article "Saargebiet," in *Handwörterbuch der Rechtswissenschaft*, Berlin-Leipzig, 1928, vol. 5, pp. 210 ff.

24. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, p. 573, n. 2; Mirkine-Guetzévitch, *op. cit.*, pp. 46 ff.; *Handwörterbuch der Rechtswissenschaft*, vol. 4, pp. 34 ff.

25. For text see Dareste-Delpech-Laferrière, vol. 2, pp. 179 ff.

26. Decisions of June 25, 1934, Series A/B no. 47, and Aug. 11, 1932, Series A/B no. 49.

27. The story is competently and exhaustively told by one of the participants in Danzig's fight for freedom, Hans L. Leonhardt, *Nazi Conquest of Danzig*, Chicago, 1942, on which the following discussion primarily draws. See also Otto Loening, "Die Verfassung der Freien Stadt Danzig," *Jahrbuch des öffentlichen Rechts*, vol.

10 (1921), pp. 439 ff.; Oppenheim-Lauterpacht, *op. cit.*, pp. 170 f.; Scelle, *op. cit.*, vol. 1, p. 254; Daresté-Delpech-Laferrière, *op. cit.*, vol. 1, pp. 429 ff.

28. The German word *Gewährleistung* is even stronger, the strongest that could be chosen. It is used in an analogous manner for the guarantee of the democratic-representative form of the government of the cantons by the Swiss Federation (see *infra* p. 345).

29. See Permanent Court of International Justice of Feb. 4, 1932, Ser. A/B no. 44, p. 21.

30. Permanent Court of International Justice, Ser. C no. 55, p. 221.

31. Of the interesting negotiations between the Council and the Free City concerning the final form of government only the following details can be given here: Upon study of the first draft the Council, Nov. 17, 1920, insisted on modifications of no fewer than seven specified provisions within three weeks. One of them was that the constitution itself grant the League the right, to demand information on internal affairs at any time, to be supplied without delay. The Council insisted also that a nationality law be submitted to it; political tutelage, thus, extended beyond the constitution proper. The National Assembly enacted that law on Dec. 12, 1920. Additional modifications required were made by another act of May 9, 1921. In order to establish a full-fledged and undiluted system of responsible government the Council requested further that the terms of office of the President of the Senate and the seven principal senators (*Senatoren im Hauptamt*)—the Senate was to be the executive branch of the government—be reduced from twelve years to four, subject to resignation in case the lower house (*Volkstag*) disapproved of the Senate's policies. On Apr. 4, 1922, the *Volkstag* accepted this request although a minority protested that the Council solicitude went too far (see Daresté-Delpech-Laferrière, *op. cit.*, vol. 1, p. 431). The constitution refers directly to the League in Arts. 5 (no manufacturing of war materials and munitions except by permission of the League); 42 (official information to be tendered the League on public affairs); 49 (constitutional amendments must be authorized by the League); 72, sec. 2 (nationality law to be submitted).

32. Rauschning has won considerable reputation as the first—and only—high-ranking Nazi who in time became converted to democracy. While his books undoubtedly roused public opinion to the awareness of the Nazi threat, he cannot be absolved from guilt in the rape of the Danzig constitution, which was begun if not consummated while he was in office (he resigned as late as Nov. 13, 1934). Nor do his writings reveal the specifications of an honest

democrat. On the contrary, he is one of the muddleheaded German conservatives whose aversion against Weimar provided the Nazis with a useful intellectual spearhead against German and world democracy.

33. See *Journal Officiel*, vol. 16 (1935), pt. II, pp. 1292-1309, and Leonhardt, *op. cit.*, 154 ff.

34. Of Dec. 4, 1935, Series A/B no. 65.

35. The minority was composed of the Japanese, Italian, and Polish judges, demonstrating, in spite of technical differences, the solidarity of the authoritarian front. Sir Cecil Hurst, the presiding judge, voted with the majority. See Leonhardt, *op. cit.*, p. 163.

#### CHAPTER IV

1. See Vernon Van Dyke, "Authoritarian Opposition to Freedom in Foreign States," *Journal of Politics*, vol. 4 (1942), pp. 437 ff.

2. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, p. 208.

3. The most notorious case was the forcible abduction of Berthold Jacob-Salomon from Swiss territory (see Lawrence Preuss, "Kidnapping of Fugitives from Justice in Foreign Territories," *Amer. Jour. of International Law*, vol. 29 (1935), pp. 502 ff.). There were numerous similar cases involving anti-Fascists (the case of Rossi) as well as anti-Bolsheviks (the case of General Miller).

4. See, for example, Sixth Pan-American Conference on Rights and Duties of States of Feb. 20, 1928, Art. 1 (*Amer. Jour. of International Law*, vol. 22 [1928], Suppl., pp. 124 ff.); Fauchille, *op. cit.*, vol. 1, pp. 499 ff.

5. The text of the pledge given by Mr. Litvinov to President Roosevelt on Nov. 16, 1933, when the United States resumed diplomatic relations with the Soviet Union, reads in part as follows (see *Amer. Jour. of International Law*, vol. 29 [1935], p. 657, n. 1): "It will be the fixed policy of the Government of the Union of Soviet Socialist Republics: (1) to respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way, and to refrain from interfering in any manner in the internal affairs of the United States, its territories and possessions." The other sections of the pledge enjoin all persons in government service and all organizations of the government, including organizations helped financially by the Soviets, not to injure the order, tranquillity, territorial and political integrity of the United States, not to assist any group or organization which claims to be the government of the United States, and not to permit the formation or existence of any group or organization aiming at the overthrow of the government by force and violence. However, in August, 1935, the United States government protested

strongly against violations of the pledge by the Communist International. In reply the Soviet Union disclaimed responsibility for the activities of the Comintern. See C. C. Hyde, "Considering a Russian Pledge," *Amer. Jour. of International Law*, vol. 29 (1936), p. 651.

6. For a convincing explanation of the Russian change of policies see Sir Bernard Pares (*Russia and the Peace*, New York, 1944), who interprets Stalin as a counterrevolutionist much closer to Peter the Great than to Lenin, no longer envisioning the spread of the Soviet system to neighboring countries.

7. In Denmark, for as yet unascertained reasons, the government of Erik Scavenius was even permitted to hold democratic elections for the Folkting as late as May 24, 1943. They resulted in an overwhelming confession of the Danish people to political democracy. In Aug., 1943, the cabinet resigned, unwilling to accede to further Nazi encroachments on internal administration. The King was interned, and the country was taken over by military occupation, under a German military governor; a Count Holstein tried in vain to act as a Quisling. The "democratic" show piece in the window of Hitler's New Order had become so shop-worn that it had to be removed.

8. No great space should be devoted to what the National Socialists call "law" of nations (*Völkerrecht*) because, in their concept of international relations, no such thing exists. Their international lawyers, past masters of opportunism, shifted with every change in direction of German foreign policy. Until 1936 Nazi doctrine insisted on the principle of equality of states and observance of nonintervention by other nations, because Germany required a justification for breaking the restrictions on her internal sovereignty imposed by Versailles. Thereafter, even later than the outbreak of the war, the doctrine preached, and the Third Reich practiced, intervention in neighboring states for the sake of "liberating" Germans abroad under the slogan of "racial consanguinity." Finally, with the full fruition of the concept of the master race, it abandoned all pretenses of equality by claiming for Germany the right to intervene in all countries whenever driven by naked lust of power. On the other hand, the versatile writers, taking their cue from an imperialistic distortion of the Monroe doctrine, bolstered the amateurish map-redrawing of the geopoliticians—another term for military conquest—with the "scientific" notion of a German-dominated European space, precluding intervention by others in the German *Lebensraum*. The notorious Carl Schmitt in his *Völkerrechtliche Grossraumordnung mit Interventionsverbot raumfremder Mächte* (Spatial Organization of Large-Scale Empires Com-

bined with Prohibited Intervention of States Devoid of Interest in Such Spaces), Berlin-Vienna, 1939, and others proclaimed the complete elimination (*Ueberwindung*) of the political entity "state" by a spatial arrangement (*op. cit.*, pp. 76 ff.). Norbert Gürke, another protagonist of a "law" of nations determined by power, considers (in *Volk und Völkerrecht*, Tübingen, 1935) the organizational frame of an overextended "Reich" as the pivot of the law of nations. Geopolitical or "spatial" thinking treated existing state boundaries and political sovereignties as obsolete residues of the past, to be brushed aside in order to achieve the German monopoly of political power. Neither treaty obligations, deemed temporary expedients without binding force when confronted by the vital necessities of the mission of the German master race, nor internationally sanctioned rights of other states were recognized. When the *Lebensraum*, in the wake of military conquest, was extended to the *Befehlsraum*, colonial exploitation and accomplished techniques of domination by terror took the place of any pretense of legal rules controlling the use of power politics. With the exception of the interlude of the German-Russian nonaggression pact (*lucus a non lucendo*), Bolshevism and the inferior races were beyond the pale of any international law—which justified their extermination (see, for example, Beckhoff, *Völkerrecht gegen Bolschewismus*, Berlin, 1937). Even formerly respectable authors such as Bruns, Wolgast, Tatarin-Tarnheyden contributed to the elimination of the notion of law from the German version of the law of nations.

Among the National Socialist writings on international law may be mentioned also: Ernst Wolgast, *Völkerrecht*, Berlin, 1934; Mosler, *Die Intervention im Völkerrecht*, Berlin, 1937; Edgar Tatarin-Tarnheyden, "Völkerrecht und organische Staatsauffassung," *Archiv für Rechts- und Wirtschaftsphilosophie*, vol. 29 (1936), pp. 306 ff.; H. Kraus, "Interesse und zwischenstaatliche Ordnung," *Niemeyers Zeitschrift für internationales Recht*, vol. 39 (1934), pp. 22 ff. For trenchant criticism of the Nazi dilution and negation of international rules see John H. Herz, "The National Socialist Doctrine of International Law and the Problems of International Organization," *Political Science Quarterly*, vol. 54 (1939), pp. 536 ff.; Eduard Bristler (pseudonym for John H. Herz), *Die Völkerrechtslehre des Nationalsozialismus*, Zürich, 1938; Jacques Fournier, *La Conception National Socialiste de droit des gens*, Paris, 1939; Hans Morgenthau, "National Socialist Doctrine of World Organization," *Proceedings of the Seventh Conference of Teachers of International Law and Related Subjects*, Washington, 1941, pp. 103 ff. In passing it may be remembered that long before the advent of Hitlerism some German writers (Zorn, Wenzel) favored

a peculiar "monistic" solution of the age-old conflict between municipal and international law by claiming the supremacy of municipal over international law (see Oppenheim-Lauterpacht, *op. cit.*, p. 50, n. 3). On the other hand, in the midst of the National Socialist intoxication by power and military might Heinrich Triepel, *Die Hegemonie: Ein Buch von führenden Staaten*, Stuttgart, 1938, had the courage to warn against the overextension of power concepts while realistically admitting the actual inequality of states by which certain more powerful political entities acquire a natural and inevitable leadership—an interpretation of history which comes close to acceptance of the system of the "Big Four" among the United Nations as future guarantors of world peace.

9. For a decade this writer, wise in his experience under the Weimar republic, has devoted much of his literary effort to this aspect of the totalitarian world-revolution. See the following publications by Karl Loewenstein: "Militant Democracy and Fundamental Rights," *Amer. Polit. Sci. Rev.*, vol. 31 (1937), pp. 417 ff., 638 ff.; "Legislative Control of Political Extremism in European Democracies," *Columbia Law Rev.*, vol. 38 (1938), pp. 591 ff., 725 ff. (expanded in French in *Revue du droit public*, vol. 54 [1938], and in a book, *Contrôle législatif de l'extrémisme politique dans les démocraties européennes*, Paris, 1939). Additional studies dealt with the phenomenon in various Latin American countries: "El Problema del Controlar Legislativo del Extremismo Político y la Legislación Uruguaya," *Revista del Derecho, Jurisprudencia y Administración* (Montevideo), vol. 39 (1941), pp. 225 ff.; *Brazil Under Vargas* (New York, 1942), pp. 133 ff.; "Legislation Against Subversive Activities in Argentina," *Harvard Law Rev.*, vol. 56 (1943), pp. 1261 ff.; "Legislation for the Defense of the State in Chile," *Columbia Law Rev.*, vol. 44 (1944), pp. 366 ff. See also Alejandro Rovira and Luis Seguí Gonzales, *Controlar de actividades subversivas en el Uruguay* (Montevideo, 1943), a synoptical compilation of the apposite Uruguayan material; Charles G. Fenwick, "Intervention by Propaganda," *Amer. Jour. of International Law*, vol. 35 (1941), pp. 656 ff. The literature on the Fifth Column is so vast that no references can be given here.

10. On Dec. 12, 1937, after the Spanish republican government finally had succeeded in invoking Art. 11 of the Covenant, a meaningless resolution was passed to the effect that "every state is under an obligation to refrain from intervening in the internal affairs of others" (*Journal Officiel*, Jan. 19, 1937). At that time Italy, the principal offender, was a member of the League.

11. The ordinary penal codes of most states, Germany and Italy included, had provisions penalizing libelous and defamatory

attacks against heads of foreign states and governments. None the less, press and radio of dictatorial states, under government instigation, indulged in the most scurrilous attacks against democratic leaders. During the period of good will preceding the Nazi revolution many people were seriously concerned about contamination of the public mind by malicious nationalistic propaganda. In 1935 the League passed a resolution for eliminating nationalistic excesses from school textbooks (see Oppenheim-Lauterpacht, *op. cit.*, p. 231, n. 2). International efforts also were under way to curb propaganda for war by internal legislation (see Mirkine-Guetzévitch, *op. cit.*, pp. 245 ff.; Vespasiano V. Pella, *La Protection de la paix par le droit interne*, Paris, 1933).

12. For the text of the convention, signed Sept. 23, 1936, and entering into force Apr. 2, 1938, see *Journal Officiel*, 1936, p. 1437, and *Amer. Jour. of International Law*, vol. 32 (1938), Suppl., pp. 123 ff. Art. 1 obligated the signatories to prohibit and to stop within their jurisdiction "any transmission of such a character as to incite the population of any country to acts incompatible with the internal order or security of any territory or a High Contracting Power"; Art. 2 was aimed at transmissions inciting to war; Art. 3 prohibited incorrect statements likely to harm international understanding. Of the great powers, only France, Great Britain, Russia ratified the convention.

13. The convention was signed Oct. 16, 1937. On its content see Manley O. Hudson, "The Proposed International Court," *Amer. Jour. of International Law*, vol. 32 (1938), pp. 549 ff.; Oppenheim-Lauterpacht, *op. cit.*, p. 239, n. 2.

14. Vargas' rule in Brazil, the outstanding example of a Latin American dictatorship of the *régime personnel* type, was neither fascist nor totalitarian but merely authoritarian. See Karl Loewenstein, *Brazil Under Vargas* (New York, 1942), and in particular the terminological distinctions on pp. 369 f.

15. For texts of the Panama Resolution XI, Final Act, see *Amer. Jour. of International Law*, vol. 34 (1940), Suppl., pp. 1 ff.; Habana Resolutions, Final Act, Resolutions II, III, V, VI, VII, *ibid.*, vol. 34 (1941), Suppl., pp. 1 ff.; Rio de Janeiro, Final Act, Resolutions XVII, XVIII, XIX, *ibid.*, vol. 36 (1942), Suppl., pp. 61 ff.

16. Resolution XVII reads in part as follows: "The Third Meeting of the Foreign Ministers of the American Republics resolves: . . . (2) To recommend to the Governments of the American Republics the adoption of similar legislative measures tending to prevent or punish as crimes, *acts against the democratic institutions of the States of the Continent in the same manner as attempts against the integrity, independence or sovereignty of any of them*; and that

the Governments of the American Republics maintain and expand their system of surveillance designed to prevent subversive activities of nationals of non-American countries, as individuals or groups, of individuals, *that originate in or are directed from a foreign country* and are intended to interfere with or limit the efforts of the American Republics, *individually or collectively*, to preserve their integrity and independence, and the *integrity and solidarity of the American Continent*. (3) To recommend to the American Republics that they adopt, in conformance with their constitutions and laws, regulatory provisions that are, as far as possible, in keeping with the memorandum which is attached to this Resolution for purposes of information." (*Italics supplied.*) The memorandum dealt with control of dangerous aliens; prevention of abuse of citizenship; regulation of transit across national boundaries; prevention of acts of political aggression. Among the acts of political aggression to be repressed are specifically mentioned: obstruction of the war effort; dissemination of Axis propaganda; control of persons and organizations acting in the interests of any non-American state not engaged in the war on the side of an American state; control of communications to and from states of the Axis or subservient thereto. The Emergency Advisory Committee for Political Defense issued its first Annual Report in July, 1943 (English transl., Washington, D.C., 1943), its second in Nov., 1944. On the committees, see the authoritative article by Carl B. Spaeth and William Sanders (the American delegates) "The Emergency Advisory Committee for Political Defense," *Amer. Jour. of International Law*, vol. 38 (1944), pp. 218 ff.; Karl Loewenstein, "Pan-Americanism in Action," *Current History*, vol. 5 (1943), pp. 229 ff. See also William Bunce Cowles, "Joint Action to Protect an American State from Axis Subversive Activity," *Amer. Jour. of International Law*, vol. 36 (1942), pp. 242 ff.

17. It should be noted that Resolution XVII of the Rio Conference provided for joint action merely by "recommendation," which, however, no American state could disregard without disassociating itself openly from the Pan American community, like wholly uncooperative Argentina. Resolution VI of the Habana Conference, on the other hand, was mandatory on all American republics (see Cowles, *op. cit.*, pp. 246 ff.). It reads in part: ". . . each one of the Governments of the American Republics *shall* adopt within its territory all necessary measures in accordance with its constitutional powers to prevent and to suppress *any activity directed, assisted or abetted by foreign governments, or foreign groups or individuals* which tend to subvert the domestic institutions, or to foment disorder in their internal political life, or to *modify* by pressure, propaganda, threats, or in any other manner, *the free and sovereign right*



*of their people to be governed by their existing democratic system"* (italics supplied).

18. Significant of the trend of Pan American solidarity are recent statutes in Chile and Uruguay to the effect that Axis-inspired subversive activities committed on the national territory, if directed against another American state, are penalized as if directed against the national sovereignty proper. See Chile, Law on the External Security of the State, no. 7401, of Dec. 31, 1942 (*Diario Oficial* of Jan. 4, 1943) and Uruguay, Decree-Law no. 10,279 of Nov. 11, 1942. See also Karl Loewenstein, "Legislation for the Defense of the State in Chile," *Columbia Law Rev.*, vol. 44 (1944), pp. 400 ff. See also the identical regulation of the Inter-American Conference on Problems of War and Peace, Final Act of Mar. 8, 1945, Resolution XXVI.

## PART II

### CHAPTER I

1. On the motion Abrami and others in the French Chamber of Deputies, June 24, 1932, aimed at inviting the member states of the League and the signatories of the Briand-Kellogg pact of 1928 to revise their constitutions in order to submit the general mobilization and the declaration of war to a popular referendum (see Mirkin-Guetzévitch, *op. cit.*, pp. 217 ff.) In the United States, the Ludlow amendment (1935) pursued similar aims. Some constitutions explicitly exclude the declaration of war from the referendum (see Mirkin-Guetzévitch, *op. cit.*, pp. 129 ff., 205 ff.). The requirement that the legislature declare war, at the proposal of the executive power, was introduced first by the Constituent Assembly of 1789 (see constitution of 1791, title III, chap. III, sec. I, Art. 2—Duguit and Monnier, *op. cit.*, p. 79) and was retained in all subsequent revolutionary constitutions including the first issued by Napoleon. The majority of liberal constitutions makes the right to declare war dependent on the assent of the legislative power (see for example United States Constitution, Art. I, sec. 8; France, Constitutional Law of July 16, 1875, Art. 9; Czechoslovakia, Constitution of 1920, Art. 64; Weimar Constitution, Art. 45, sec. 2). The cabinet of Daladier in 1939 declared war without consultation or subsequent formal assent of the parliament although the latter conclusively gave its adhesion and consent. Most monarchical regimes, including Britain, do not require the formal assent of the parliament, although as a rule the latter resolves to declare war. (See,

for example, the German Constitution of 1871, Art. 11, sentence 2; this was amended Oct. 18, 1918, to assign declaration of war and conclusion of peace to the Reichstag.)

Another method, in a democratic state, of making war more difficult was adopted in the Spanish penal code of 1932 which, in Article 129 (the section on treason) punishes the president of the republic and the ministers who, in violation of Art. 77 of the constitution of 1931 sign a decree of war without having observed the provisions prescribed by the League Covenant, and without having exhausted all nonbelligerent methods under the conventions which Spain has concluded, and those officials who declare war without authorization by law (see Luis Jiménez de Asúa, "El Derecho penal del futuro," in *El Mundo del posguerra* (Buenos Aires, 1944), pp. 61 f.).

The question of the actual declaration of war is subordinated today to the wider problem of the definition of the aggressor and the acts of aggression. (See Harvard Research Draft, pt. III, "Rights and Duties of States in Case of Aggression," *Amer. Jour. of International Law*, vol. 33 (1935), pp. 819 ff.) All such attempts are wholly futile as long as they are geared only to outward acts by which aggression is actually threatened or undertaken, and as long as the other states remain indifferent to internal conditions which prepare and lead to aggression. Striking evidence of the impasse which results if the repression of aggression is linked to strict nonintervention is provided by the convention between Soviet Russia, Estonia, Latvia, Poland, Rumania, Iran, Turkey, and Afghanistan, and later adhered to by Finland, signed at London on July 3, 1933. In Art. 2 the signatories agreed to consider as aggressor any state which should commit first a number of specified acts (declaration of war, attack, invasion by armed force, etc.). Art. 3 went on to say: "No political, military, economic, or other considerations may serve as an excuse or justification for the aggression referred to . . ." So far probably everybody would go along. But an annex to Art. 3 seeks to define the aggressor within the scope of Art. 2—aggression cannot be justified on either of the following grounds: (a) the internal conditions of a state—for example, its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, or counterrevolutions, or civil war; (b) the international conduct of a state—for example, the violation or threatened violation of the material or moral rights or interests of a foreign state or its nationals, etc. In other words, the internal conditions of a state, the violation of the human rights of its citizens, nationalistic propaganda, armaments, visible preparations for war, may become so explosive that other states are threat-

ened. But if they intervene in time to prevent war, intervention is tantamount to aggression, and the interveners are guilty of trespass.

2. Some glimpses of the relevant problems are found in an annoyingly superficial discussion by Joseph-Barthélemy (later Vichy Minister of Justice), "Politique intérieure et le droit international," Académie du Droit International de la Haye, *Recueil des Cours*, 1937, vol. 1, pp. 429-520.

3. To this writer's knowledge the only exception is Mortimer Adler, *How to Think About War and Peace* (New York, 1943), p. 239: "A federal government of the world requires political homogeneity among its component states. A world federation would have to be constitutional. In consequence all the federated states would have to be republican. None could be dictatorships or absolute monarchies. Despotisms and constitutions cannot federate. To this extent, at least, political uniformity is required in a set of federated states, even if all are not equally democratic in their constitutions." An example (chosen at random) of the stereotyped indifference toward the form of government in blueprints of the future world organization is "Proposed Constitution of the United Nations," no. 43, in Howard O. Eaton and others, *Federation: The Coming Structure of World Government* (Norman, Okla., 1944), pp. 211 ff.

4. Most writers construe the League of Nations as a federation; see Oppenheim-Lauterpacht, *op. cit.*, pp. 306 ff. (who himself holds that the League was neither a federation nor an alliance, but a legal phenomenon *sui generis*).

5. For a century and more this was the central theme of German politics and political theory—which, consequently, described these institutions most thoroughly and competently. See Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed. (Berlin 1922), pp. 762 ff.

6. See *Esprit des Lois*, IX, 2 under the title: "Que la constitution fédérative doit être composée d'états de la même nature, surtout d'états républicains." The brief chapter is full of wisdom. "L'esprit de la monarchie est la guerre et l'agrandissement; l'esprit de la république est la paix et la modération. Ces deux sortes de gouvernement ne peuvent que d'une manière forcée subsister dans une république fédérative." "Tout fût perdu pour la Grèce, lorsque les rois de Macédoine obtinrent une place parmi les amphictions." The German federation, composed of free cities and small states under princes, the finds, could endure "parcequ'elle a un chef, qui est en quelque façon le magistrat de l'union, et en quelque façon le monarque," implying that the affinity of the monarchical form of government between the princes and the head of the federation permitted their continued cooperation.

7. Argentina: Constitution of 1853, Arts. 5, 6. Intervention by the federal government, in the self-rule of the provinces, is the cardinal problem of Argentine federalism. The leading monograph is L. H. Sommariva, *Historia de las intervenciones federales en las provincias de la República Argentina*, 2 vols. (Buenos Aires, 1929-1931). See also Santos P. Amadeo, *Argentine Constitutional Law* (New York, 1943), pp. 89 ff.; Austin F. Macdonald, *Government of the Argentine Republic* (New York, 1942), pp. 169 ff.; Karl Loewenstein, "Legislation Against Subversive Activities in Argentina," *Harvard Law Review*, vol. 56 (1943), pp. 1277 ff.

Brazil, Constitution of 1937: The conformance to the republican and representative form of government is implied in Art. 9, letter c (1), permitting intervention of the president in the states in order to guarantee the republican and representative form of government. Under the Vargas regime the states lost their identity as separate entities under the impact of dictatorial centralization, and were operated through "interventors," appointed by the federal government, as instruments of political coordination. See Karl Loewenstein, *Brazil Under Vargas* (New York, 1942), pp. 59 ff. Under the republican constitution before 1937 the issue was vital (see Pedro Calmon, *Curso de direito constitucional brasileiro*, Rio de Janeiro, 1937, pp. 65 ff.).

Mexico: Constitution of 1917, Arts. 40, 115.

Venezuela: Constitution of 1936, Art. 13.

8. In the United States the republican form of government is a "political question" beyond judicialization of the courts. See the famous decisions *Luther v. Borden*, 7 Howard 1 (1849); *Texas v. White*, 7 Wall. 700 (1869); *Pacific States Telegraph & Telephone Co. v. Oregon*, 223 U.S. 118 (1912); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1927). See also Charles Gordon Post, *The Supreme Court and Political Questions* (Baltimore, 1936), pp. 15 ff., 106 ff., 125 ff. Harold Zink, *Government and Politics in the United States* (New York, 1943), pp. 39 f., holds—and, on the basis of the evidence one is bound to agree—that the clause has little if any practical meaning since no machinery of federal intervention exists similar to that in other federal states, for dealing with violations of the clause in letter or spirit. It is left to Congress and the President to see to it that the states have a "republican form of government." It may well be that the habit of boss rule is deemed compatible with "republican" government if it does not tamper too unblushingly with the state constitutions. Consequently the federal paper "guarantee" did not prevent Huey Long from establishing a virtual dictatorship in Louisiana, through corrupt legislators and courts, by distortions and elastic interpretations of

the state constitution. It is doubtful whether even the most revolting of such cases would ever lead to an intervention by the federal government. As a rule the people, after a period of flagrant abuses, become tired of boss rule and set their own house in order.

9. The problem is of particular interest in Switzerland. The Swiss had a rather disturbing experience with a diversity in forms of government when, in 1847, the canton of Neuchâtel, then under the nominal sovereignty of the King of Prussia, made a pass at monarchy which was repelled in the so-called Sonderbund War. Art. 6 of the federal constitutions of 1848 and 1874 reads as follows (in translation): "The cantons are obligated to seek from the confederation the guarantee [*Gewährleistung*] of their constitutions. This guarantee is to be granted under the condition (a) that they contain nothing in conflict with the federal constitution; (b) that they insure the exercise of political rights according to republican (representative or democratic) principles [*Formen*]; (c) that they have been accepted by the people and that they are subject to amendment if the absolute majority of citizens so require." These constitutional arrangements are remarkable for several reasons (see Fritz Fleiner, *Schweizerisches Bundesstaatsrecht*, Tübingen, 1923, pp. 56 ff.; A. Cuin, *La Garantie des constitutions cantonales et les droits constitutionnels des citoyens de la Confédération Suisse*, Paris, 1908). No canton can be a member of the confederation unless it possesses a "republican" constitution. The term "republican" differs from that used in the United States constitution (Art. IV, sec. 4) in that the federal constitution itself specifies that it must be either representative or democratic. This means that a canton's political existence must be based either on representative institutions, or on the democratic instrumentalities of referendum and initiative, or on a combination of both; the latter is the rule today. In addition, cantonal constitution must not contain any provision in conflict with the federal constitution, and cannot grant to their citizens fewer political rights than the federal constitution proper. Thus, the cantons' free choice of form of government is limited. Within these limits, however, the cantons may organize themselves politically as they deem fit. But even if a canton prefers the system of representative democracy its constitution and constitutional amendments (partial revisions) are subject to ratification by constitutional referendum of the majority of the citizens. These rules are strictly and faithfully enforced (on interventions by the federal government, see Fleiner, *op. cit.*, p. 71). Only the constitution of the canton of Fribourg of Mar. 4, 1848, was accepted by a Resolution of the parliament (Grand Council)—a procedure deemed objectionable and to be avoided in the future (see Fleiner, *op. cit.*, p. 57,

n. 11). The procedure for obtaining the federal guarantee is regulated by the *Bundesbeschluss* (federal parliament resolution) of 1851. Solicitation of approval is a duty which the canton cannot evade. The requirement of federal approval has caused even the most insignificant amendments of cantonal constitutions to be formulated as constitutional amendments and submitted to Berne for formal confirmation, without which it would be invalid. On the other hand, if a cantonal constitution conforms to the requirements of the federal constitution, the federal parliament (*Bundesversammlung*) cannot withhold the guarantee. As a rule it does not enjoin the canton to change or to eliminate an objectionable provision; it just excludes this from federal confirmation. Lately a canton enacted a constitution with the proviso that it would enter into force if ratified by the federal authorities, decidedly an abuse of the text of the constitution (see Fleiner, *op. cit.*, p. 58, n. 17). This system of federal control has not been found to encroach upon the constitutional autonomy of the cantons, nor to shackle their individual political life. To the cantons a high degree of self-government is conceded, and the constitution itself speaks of them as "sovereign" (Art. 3). There is in all the world hardly a more individualistic people than the Swiss. At no time was this arrangement considered incompatible with its democratic self-respect.

10. The so-called *landständische Verfassung* (representation by estates) was uniformly prescribed by the Act of Congress of Vienna of June 13, 1815, Art. 13. The Final Act of Vienna "on the completion and consolidation of the German Confederation" of May 15, 1820 (Martens, *N. R.*, vol. 5, p. 467), repeating the requirement, placed its fulfillment under the supervision of the Federal Assembly (Art. 54). Art. 57 enjoined on all member states the monarchical form of government.

11. According to Art. 186 of the Constitution of Mar. 28, 1848, "every state shall have a constitution, a parliament, and the ministers shall be responsible to the latter." Art. 187 specified in great detail the mandatory requirements and powers. Art. 130 enjoined conformity of all constitutions with the national bill of rights which, in Art. 12, prescribed equality as the basis of a constitutional government. In addition, Art. 195 made all changes of the form of government (*Regierungsform*) of the member states dependent on assent of the federal powers by the qualified majority prescribed for amendments of the federal constitution. This frame was compatible with monarchical and republican states; of the latter Germany had at that time four (Frankfurt-on-the-Main, Hamburg, Bremen, and Lübeck). On federalism under the Paulskirche constitution see Karl Binding, *Zum Werden und Leben der Staaten*

(Munich-Leipzig, 1920), pp. 6 ff.; Heinrich von Sybel, *Die Begründung des deutschen Reichs durch Wilhelm I*, 3rd ed. (Munich-Leipzig, 1913), vol. 1, pp. 110 ff.

12. Art. 17: "Jedes Land musz eine freistaatliche Verfassung haben." See Gerhard Anschütz, *op. cit.*, p. 131.

13. There existed unicameral and bicameral representations; state presidents as head of state, or prime ministers in this function; the most diverse electoral laws; application of direct democracy, optional and mandatory. The most original constitutions were those of Baden, Lübeck, and Prussia.

14. Arnold Brecht, *Prelude to Silence* (New York, 1944), pp. 65 ff., misses this essential point: the authoritarian government of the Reich (the "presidential" cabinet appointed by von Hindenburg at that time) could not countenance the existence of a divergent form of government—parliamentary democracy—in the most important of the *Länder*, Prussia.

15. For details see Karl Loewenstein, in James T. Shotwell, *op. cit.*, pp. 352 ff.; Fritz Pötsch-Heffter, "Vom Staatsleben unter der Weimarer Republik," *Jahrbuch des öffentlichen Rechts*, vol. 13 (1925), pp. 138 ff.

## CHAPTER II

1. See James Burnham, *The Machiavellians* (New York, 1943), pp. 55 ff., for a notable interpretation.

2. See Karl Loewenstein, *Hitler's Germany*, 4th ed. (New York, 1944), pp. 34 ff.

3. *Six Livres de la Republique* (Lyon, 1579), II, 1 and 2; see Hermann Rehm, *Geschichte der Staatsrechtswissenschaft* (Freiburg-Leipzig, 1896), pp. 225 ff., 230.

4. *Philosophical Essay on the Eternal Peace*, pp. 78 f.: "The second principle of division is taken from the form of government [*forma regiminis*]; and, . . . it regards the mode in which the State, founded on the constitution, makes use of its supreme power. In this connection the form of government is either republican or despotic. Republicanism regarded as the constitutive principle of a State is the political severance of the executive power of the government from the legislative power. Despotism is in principle the irresponsible executive administration of the State by laws laid down and enacted by the same power who administers them."

5. In this book the terms "political democracy" and "constitutional-democratic state" are frequently used as synonyms. The reader should not connect the latter term with the existence of a written constitution. The term "autocracy," on the other hand, may have an unfamiliar ring. It is used because it is broader than

"dictatorship"; it includes also authoritarian government, which does not necessarily coincide with totalitarian, fascist, or dictatorial government.

6. Philological sticklers may note that, throughout the Atlantic Charter, the terms "state," "people," "nation" are used rather indiscriminately and almost interchangeably.

7. See Carl J. Friedrich, *Constitutional Government and Democracy* (Boston, 1941), pp. 235 ff.; Frederick M. Watkins, *The Failure of Constitutional Emergency Powers Under the German Republic* (Cambridge, Mass., 1939). This refers also the practice of *pleins pouvoirs*, in vogue in France before the collapse and widely though wholly erroneously considered as a sign of decay of the parliamentary system. See Karl Loewenstein, "The Balance Between Legislative and Executive Power," *University of Chicago Law Review*, vol. 5 (1938), pp. 598 ff. and the literature in n. 95. Delegation of powers by the parliament to the government, for a specific purpose or in general, is an essential method of running the government in states of the multiple party structure. It is likely that postwar political reconstruction will have to use the method extensively.

8. There is still no satisfactory comparative study of modern Caesarism, in spite of whole libraries on individual dictatorships. The best treatment of the phenomenon, named "Bonapartism" after its inventor and most accomplished manipulator, Napoleon Bonaparte, is found in German. See Heinrich von Treitschke, *Politik*, 4th ed. (Leipzig, 1918), pp. 189 ff., where he calls it "democratic tyranny"; Wilhelm Roscher, *Politik*, 3rd ed. (Stuttgart-Berlin, 1908), pp. 588 ff.; Robert Michels, *Zur Soziologie des Parteiwesens in der modernen Demokratie*, 2nd ed. (Leipzig, 1925), pp. 270 ff. See also Joseph-Barthélemy, *Traité du Droit Constitutionnel* (Paris, 1933), pp. 253 ff. Among the general treatments of dictatorship, none of them satisfactory, may be mentioned F. Cambo, *Les Dittaturas* (Paris, 1930); Alfred Cobban, *Dictatorship: Its History and Theory* (London, 1939); Diana Spearman, *Modern Dictatorship* (London, 1939). Siegmund Neumann's *Permanent Revolution* (New York, 1942), in many respects a penetrating exposition of the social and psychological conditions of dictatorship, is not interested in the legal structure. On some aspects of the Napoleonic dictatorship see Karl Loewenstein, "The Dictatorship of Napoleon the First," *South Atlantic Quarterly*, vol. 34 (1936), pp. 298 ff.; *idem*, "Opposition and Public Opinion Under the Dictatorship of Napoleon the First," *Social Research*, vol. 4 (1937), pp. 461 ff. For a sympathetic approach to the Caesarism of Napoleon III, see Albert L. Guérard, *Napoleon III* (Cambridge, Mass., 1943).



9. On the psychological relationship between the leader and his followers—based on his “charisma”—see Max Weber, “Wirtschaft und Gesellschaft,” in *Grundriss der Sozialökonomik*, (Tübingen, 1922), pp. 140 ff.

16. Louis Napoleon's election as President of the Second Republic in 1849 by an absolute majority of 5,534,520 votes, out of a total of 7,426,252 votes cast, was followed by the *coup d'état* of Dec. 2, 1851; see Maurice Deslandres, *Histoire Constitutionnelle de la France* (Paris, 1932), vol. 2, p. 393. In the Reichstag elections of Mar. 5, 1933, Hitler obtained not more than 44 per cent of the total vote—and this only by unprecedented election terror. The Enabling Act of Mar. 24, 1933, which gave him the right to amend the constitution by decree-law of his cabinet, was a full-fledged *coup d'état* (see Karl Loewenstein, “Dictatorship and the German Constitution 1933-1937,” *University of Chicago Law Review*, vol. 4 [1937], pp. 541 ff.). Mussolini gained absolute power by amending, in successive stages, the Italian constitution, particularly by forcing upon the country new electoral laws which provided automatic majorities of the Fascist party (see Arnold T. Zurcher, “Italy,” in James T. Shotwell, *op. cit.*, pp. 640 ff.). Not one of the plebiscites held under the two Napoleons, Hitler, Mussolini, was honest by the most elementary democratic standards. Franco in Spain and the royal dictators in the Balkans abstained altogether from the formal legalizing of their absolute regimes by pseudodemocratic methods.

### CHAPTER III

1. The historical examples of openly dictatorial constitutions—three under Napoleon I and at least one under his nephew—by a hierarchical arrangement of institutions made the dictator omnipotent; they do not affect the rule because Caesarism of the older style was not yet totalitarian.

2. That neither Great Britain nor Hungary has a formalized written constitution is no effective counterargument. In Britain the traditions of the common law, and the corresponding “conventions of the constitution” articulate political democracy as efficiently as would any written instrument. Even the Irish aversion against Britain could not prevent the British parliamentary system from becoming statutory in Eire under the constitutions of 1922 and 1937. The singular case of Hungary requires a more detailed discussion (*infra*, pp. 253 ff.).

3. The Latin dislike of woman suffrage is disappearing. Several Latin American states introduced it recently. The French Committee of National Liberation extended the vote to both sexes.

4. F. H. Hermens, *Democracy or Anarchy?* (Notre Dame, Ind.,

1941). None of his critics invalidated the thesis. That proportional representation operates tolerably well in the municipal sphere—even this is by no means uncontested—or in smaller and marginal countries (Switzerland, Scandinavia, Eire), proves more the maturity of these nations than the serviceability of the technique of proportional representation. On its deleterious role in the Weimar system, see Hermens, *op. cit.*, pp. 214 ff., and Karl Loewenstein in James T. Shotwell, *op. cit.*, pp. 369 ff.

5. For the arrangements under the Polish constitution of 1935, whose pattern was widely copied when other states changed over from the "parliamentary" to the "presidential" form of government, see John A. Hawgood, *Modern Constitutions Since 1787* (London, 1939), pp. 338 ff. The franchise for the Sejm was restricted. Of the members of the Senate one-third was appointed by the president, two-thirds were "elected" through electoral colleges by a select class of privileged citizens (war veterans, landowners, etc.). See also Raymond Leslie Buell, *Poland, Key to Europe* (New York, 1941), pp. 97 ff. Buell finds that the system under the Constitution of 1935 is based on the "solidarity of the elite," and that the composition of parliament under the electoral laws of July, 1935, was largely determined by the government and the administrative agencies.

6. This situation existed in most dictatorships and authoritarian states—in Italy, Spain, Portugal, Austria after 1934, Rumania after 1938, Pétain-France, and others. Party loyalty or other uncontrollable distinction qualified for appointment. The Nazi system of popular ratification, by plebiscite or election, of a list of members appointed by Hitler and the National Socialist party retained only the pretense of democratic procedures; see Karl Loewenstein, *Hitler's Germany*, 4th ed. (New York, 1940), pp. 62 ff.

7. The allegedly democratic arguments against a third or fourth term for the president of the United States are wholly beside the point. At regular intervals the American people are free to repudiate the incumbent through the popular vote. On the contrary, the continuation in office of President Roosevelt demonstrated the receptiveness of the American people to the values and requirements of genuine leadership. His reelection on Nov. 7, 1944, was the greatest triumph of living democracy imaginable. This does not mean that a limitation of the presidential office to the maximum of two consecutive terms would be wholly unwise, since only very exceptional men can stand the strain of office over a longer period.

8. The author had the privilege of participating as adviser in the project sponsored by the American Law Institute, under the

leadership of Dr. William Draper Lewis, to formulate "The Essential Human Freedoms" (published Philadelphia, 1944). His conclusions in this book are largely derived from the discussions in preparation of the project, which convincingly proved that members of the principal political civilizations of today could agree on a catalogue of essential human freedoms. The author acknowledges his indebtedness to Dr. Lewis and to Ricardo J. Alfaro and John E. Mulder, who served with him on the subcommittee on political rights, for valuable suggestions and criticism.

9. Omitted here are the predominantly liberal individual guarantees, such as freedom of worship, equality before the law, habeas corpus and fair trial, absence of discrimination for reasons of race, creed, sex, color. They are as much part and parcel of political democracy as the political rights proper.

10. For a masterly statement of the dilemma, see Robert E. Cushman, "Civil Liberty After the War," *Amer. Polit. Sci. Rev.*, vol. 36 (1944), pp. 1 ff. The subject is of course one of the most discussed in this period witnessing the beginning of transition from liberal to "disciplined" democracy. The classic restatement of intransigent liberalism is Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, Mass., 1941). Noteworthy contributions, distinguished by insight into the social forces operating free speech and related rights, are David Riesman, "Democracy and Defamation: Control of Group Libel," *Columbia Law Rev.*, vol. 42 (1942), pp. 728 ff.; *idem*, "Democracy and Defamation: Fair Game and Fair Comment," *ibid.*, vol. 42 (1942), pp. 1085 ff. For the parallel situation in Britain—where wartime restrictions on activities deemed subversive were less controversial than in this country—see Sir Cecil Carr, "A Regulated Liberty," *Columbia Law Rev.*, vol. 42 (1942), pp. 339 ff.

11. "Retribution"—transl. by E. A. Bowring of "Harfenspieler," in *Wilhelm Meisters Lehrjahre*, Bk. 3, chap. 13:

"Ye lead us onward into life, ye leave  
The wretch to fall; then yield him up, in woe,  
Remorse, and pain, unceasingly to grieve;  
For every sin is punished here below."

12. For recent discussions of constitutional reform in the United States see Henry Hazlitt, *A New Constitution Now* (New York, 1942); Harold J. Laski, *The American Presidency* (New York, 1940), pp. 96 ff.; William C. Redfield, "Cabinet Members on the Floor of Congress," reprinted in A. N. Christensen and E. M. Kirkpatrick, eds., *The People, Politics, and the Politician* (New York, 1941), pp. 97 ff.; Alexander F. W. Hehmeyer, *Time for Change* (New York,

1943). See also George Fort Milton, *The Use of Presidential Power, 1789-1943* (Boston, 1944).

13. This refers to the two basic faults of the Weimar system. Arts. 53-54 made the conduct of the office of the Reich chancellor dependent on the confidence simultaneously of the Reich president and of the Reichstag. These prerequisites of constitutional government, proved, in the long run, to be incompatible. Democracy was bound to be destroyed, once both the president and the Reich chancellor were averse to democracy, like von Hindenburg, a monarchist, and Dr. Brüning. The second basic fault was in Art. 48, which assigned unrestricted emergency powers to the Reich government, eliminating the Reichstag and facilitating the relapse into authoritarian government as it had existed under the Imperial monarchy. Dr. Brüning abused the emergency powers at a time (July, 1930) when the antidemocratic wave still could have been controlled by a militantly democratic government. Moreover, legislation for the effective defense of the democratic state against totalitarian subversion was lacking, and morally corrupt judges and administrators who were never exposed to a purge, played into the hands of the totalitarian wreckers of democracy with the known result. The situation is analyzed by Karl Loewenstein, in James T. Shotwell, *op. cit.*, pp. 363 ff. See also Arnold Brecht, *op. cit.*, whose efforts to whitewash Dr. Brüning are far from convincing.

14. Judge Learned Hand said with admirable simplicity on "I-am-an-American-Day," May 30, 1944, as reported by the *New Yorker* of June 10, 1944 (p. 16): "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. . . . The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him, who near two thousand years ago taught mankind that lesson it has never learned but has never quite forgotten: that there may be a kingdom where the least shall be heard and considered side by side with the greatest."

### PART THREE

#### CHAPTER I

1. Rising monarchical prestige was observed as early as 1935 by Karl Loewenstein, "Monarchy Gains Lost Ground in Europe," *Social Science*, vol. 2 (1936), pp. 201 ff.

2. It will be remembered that the cabinet-in-exile of Pierlot, on May 30, 1940, had deprived the King of his functions because of the capitulation. Some material on the issue is found in John A. Gade, *All My Born Days* (New York, 1942), pp. 338 ff., 355 ff., and *passim*. See also Waverley Root, *The Secret History of the War* (New York, 1945), vol. 1, pp. 90 ff.

3. Curiously enough Ethiopia is among the countries where a monarchy in existence before the occupation has been restored. Little has been heard about this symbolic victim of totalitarian aggression since the defeat of the Italian army by the British. Haile Selassie, that pathetically wise little man, who predicted in Geneva what would happen to the strong nations, was returned to his throne by the British, under an Anglo-Ethiopian agreement in 1942, with British military control. Seemingly the rule of the Emperor was deemed legitimate and not exposed to awkward scrutiny as to whether the people of the forcibly subjected tribes wished him back. The case, rather unimportant in itself, demonstrates that the Atlantic Charter at first sight is inapplicable to countries on a lower level of political civilization. On conditions in Ethiopia after the reconquest see E. Sylvia Pankhurst in the *Nation*, July 8, 1944, p. 55.

4. Establishment of the Regency in case the King finds himself prevented from exercising his function is prescribed by Art. 82 of the Belgian constitution of 1831. In the first vote of the lower house the required majority was unobtainable. In the second ballot 217 votes were in favor of Prince Charles and 45 were blanks, indicating that the Communists and a substantial section of the Socialists disapproved. Later events suggest that the opposition was directed less against the person of the Regent than against the institution of monarchy as such.

5. See Arnold J. Zurcher in James T. Shotwell, *op. cit.*, pp. 626 ff. The doctrine of Fascism always insisted on the monarchical character of the regime and treated the person of the King with the utmost deference. See Saverio Marzano, *Luce nell' Occidente: Le Manifestazioni del Fascismo* (Milan, 1933), p. 126: "Il Fascismo, dunque, è monarchico; e non poteva non essere tale."

6. *New York Times*, May 13, 1945, Section 2.

7. The formal oath which the second Bonomi cabinet took in Dec., 1944, and which the members of the government of Ferruccio Parri repeated on June 21, 1945, reads as follows: "I swear on my honor to carry out my duties as ——— in the supreme interest of the nation *and not to do anything before the convocation of the Constituent Assembly that in any way would prejudice the solution of the institutional question.*" (Italics supplied.)

8. An interesting insight into the relations between Mussolini, the Fascist hierarchy, and the Crown is gained from Count Dino Grandi's involuntary self-exposure in *Life* of Feb. 26, 1945, pp. 21 ff.: "Only the king could do it [overthrow the dictator], and only a resolution from the Grand Council asking for it would empower the monarchy to act" (p. 81). See also Mario Rossi, "Fascism Without Mussolini," *Nation*, May 12, 1945, pp. 539 ff.

9. See Gaetano Salvemini and George La Piana, *What to Do with Italy* (New York, 1943), pp. 32 ff.

10. The condemnation of Italian parliamentarism by Guglielmo Ferrero, *Principles of Power* (New York, 1942), pp. 226-276, and by Margot Hentze, *Pre-Fascist Italy: The Rise and Fall of the Parliamentary Regime* (London, 1939), is not shared by this writer. As long as there were no nation-wide mass parties with continuously operating machines, parliamentarism was bound to be oligarchic, as demonstrated by Britain between 1832 and 1867 and by France before 1900.

11. The following source material was primarily consulted: G. D. Daskalakis, "Die Verfassungsentwicklung Griechenlands," *Jahrbuch des öffentlichen Rechts*, vol. 24 (1937), pp. 266 ff.; Stephen P. Ladas, "Government and People in Postwar Greece," in *Greece of Tomorrow*, ed. George H. Chase (New York, 1943), pp. 86 ff. (the author is pro-royalist); Nicholas S. Kaltchas, *Introduction to the Constitutional History of Modern Greece* (New York, 1940), pp. 148 ff.; Dareste-Delpech-Laferrrière, *op. cit.*, vol. 1, pp. 641 ff.

12. The document is merely a modernization of the authoritarian monarchy initiated in 1864. For text see *Revue du droit public*, vol. 29 (1912), pp. 121 ff.

13. See the illuminating chapters in Leigh White, *The Long Balkan Night* (New York, 1944), pp. 184 ff., 330 ff.

14. For further reference may be consulted: Winifred N. Hadsel, "The Struggle for Yugoslavia," *Foreign Policy Reports*, vol. 19 (1944), pp. 314 ff.; Rebecca West, *Black Lamb and Grey Falcon* (New York, 1943); Louis Adamic, *My Native Land* (New York, 1943); Svetozar Pribitchévitch, *La Dictature du Roi Alexandre* (Paris, 1933). Marshal Tito does not appear to be antiroyalist, as indicated by his willingness to cooperate with the Subich cabinet established in June, 1944.

15. On the constitutional developments of Rumania, see Walter Anderssen, "Die Entwicklung des öffentlichen Rechts in Rumänien vom 1. Juli 1930 bis 30. June 1938," *Jahrbuch des öffentlichen Rechts*, vol. 25 (1938), pp. 376 ff. For a description of Carol's misrule by one who understands what political corruption means, see Rosie G. Waldeck, *Athene Palace* (New York, 1942).

16. On Bulgaria's recent constitutional history see the excellent monograph by C. E. Black, *The Establishment of Constitutional Government in Bulgaria* (Princeton, 1944); Daresté-Delpech-Laferrrière, *op. cit.*, vol. 1, pp. 371 ff. It is worth while to recall briefly that Bulgaria, separated from the Sublime Porte and created as an autonomous principality by the Treaty of Berlin of July 13, 1878, was at first under an Imperial Russian Commissioner. After the adoption of the so-called Trnovo Constitution of April 16/28, 1879, Prince Alexander of Battenberg was the provisional ruler until he was induced by Tsar Alexander I to abdicate (1886). The National Assembly then offered the crown first to Prince Waldemar of Denmark, who refused; thereafter to Prince Ferdinand of Saxe-Coburg-Gotha, who accepted (October 19/31, 1886) and assumed the official title of Tsar in 1911. The constitutional reform undertaken simultaneously approximated the monarchical regime to the constitutional monarchy of the Belgian type. Ferdinand abdicated after World War I. In the postwar era Bulgaria under King Boris III, an unusually able and forceful ruler, slipped back with ease into authoritarian monarchy.

17. At that time the monarchical idea was still so strong that the territories in the East occupied by the Central Powers were considered to be legitimate objectives of monarchical expansion. Around Poland, the Baltic territories, the Ukraine, unsavory quarrels were fought among the German dynasties eager for new crowns or at least hats of dukes.

18. See R. H. Soltau, *French Political Thought in the Nineteenth Century* (New Haven, 1931); A. Thibaudet, *Les Idées politiques de la France* (Paris, 1932).

19. There is no objective study of the Franco government. For a Spanish description see Ignacio María de Lojendio, *Régimen político del Estado Español* (Barcelona, 1942). The book is an effort to interpret the Falangist regime from the viewpoint of positive law without demonstrating servility to the regime. A poignant description of the internal conditions is Thomas A. Hamilton, *Appeasement's Child: The Franco Regime in Spain* (New York, 1943). See also Julio Alvarez del Vayo, *Freedom's Battle* (New York, 1940); E. Allison Peers, *Spain in Eclipse* (London, 1943). On the intellectual background of the Falangist movement see Bailey W. Diffie, "The Ideology of Hispanidad," *Spanish American Historical Review*, vol. 23 (1943), pp. 457 ff.

20. The present pretender is Infant Don Juan (born 1913), third son of King Alfonso XIII (died in Rome in 1942); his two older brothers had renounced (June 11, 1933) the right to the throne because of disqualifying marriages; the oldest son died 1933.

21. See, for example, Law of Dec. 15, 1938, on the restoration of the royal Property, *Boletín Oficial* no. 173 of Dec. 20, 1938, p. 3039.

22. The "Declaration on Austria," attached to the Joint Communiqué of the Tripartite Conference in Moscow of Nov. 1, 1943, refers only to the restoration of the external independence of Austria. It says: The governments of Great Britain, Russia, and the United States "declare that they wish to see reestablished a free and independent Austria and thereby open the way for the Austrian people themselves . . . to find that political and economic security which is the only basis for lasting peace." What is meant by "political security" was not further amplified; but the reference to "the Austrian people themselves" may suggest democratic legitimacy as the basis of the form of government.

23. See Fritz Pötzsch-Heffter, "Vom Staatsleben unter der Weimarer Verfassung," *Jahrbuch des öffentlichen Rechts*, vol. 21 (1933-34), pp. 7 f.

24. The negotiations conducted by Minister President Held and Herr Schäffer, leaders of the Catholic party, with the pretender were abortive, allegedly because of disagreement on the civil list. According to the personal information of this writer Colonel von Leeb (later Nazi Field Marshal), commanding the Seventh Reichswehr division, himself a Bavarian, would not have interfered if confronted with a *fait accompli*.

## CHAPTER II

1. In spite of the immense interest in monarchy and the vast literature on the subject in the past, there is no competent modern, sociologically orientated study of this political phenomenon in a democratically rationalized environment. Those who wish to study the intellectual incubation of its modern usage have still to rely on French authors of the early nineteenth century, either defenders of legitimism, like De Bonald, De Maistre, De Chateaubriand, or on the theorists of "constitutional sovereignty" of the liberal monarchy, like Benjamin Constant, Royer-Collard, and Guizot. Likewise the German contributions to the systematization of constitutional monarchy of the Central European version, from Hegel and F. J. Stahl to Roscher and Treitschke, may still be studied with considerable profit. What little there is of a theory of British monarchy, from Walter Bagehot down to Sidney Low, Harold Laski, and W. Ivor Jennings, had relatively little effect on contemporary monarchical thought in other countries, much as the British institutions as such influenced pragmatic applications on the continent.

The following discussion is indebted primarily to Georg Jel-



linek, *Allgemeine Staatslehre*, 3rd ed. (Berlin, 1922), pp. 669 ff. (the unsurpassed masterpiece in the treatment of the subject); Carl Schmitt, *Verfassungslehre* (Munich-Leipzig, 1928), pp. 44 ff., 282 ff.; Heinrich von Treitschke, *Politik* (Leipzig, 1918), vol. 2, pp. 52 ff.; F. C. Dahlmann, *Die Politik* (Leipzig, 1847), vol. 1, pp. 85 ff.; Wilhelm Roscher, *Politik: Geschichtliche Naturlehre der Monarchie, Aristokratie und die Demokratie*, 3rd ed. (Stuttgart-Berlin, 1908), pp. 18 ff., 193 ff.; Wilhelm van Calker, "Die staatlichen Herrschaftsformen," in *Handbuch der Politik* (Leipzig, 1920), vol. 1, pp. 150 ff.; Otto Hintze, "Das monarchische Prinzip und die konstitutionelle Verfassung," in *Preussische Jahrbücher*, vol. 144 (1911), pp. 387 ff. Valuable information on different countries and periods is found in John A. Hawgood, *Modern Constitutions Since 1787* (New York, 1939). Penetrating studies on essence and ends of monarchy are found in Guglielmo Ferrero, *Principles of Power* (New York, 1942) and *Peace and War* (London, 1933), pp. 153 ff. See also Pitirim Sorokin, *Monarchs and Rulers* (1926); C. H. Sherrill, *The Purple or the Red* (New York, 1924); W. Rauschenberger, *Das Genie und Tadeln des Herrschens* (Munich, 1923); Paul Dvorak, *Gott und König* (Berlin, 1939); Friedrich Naumann, *Der Kaiser im Volksstaat* (Berlin, 1917); Edmund Bernatzik, *Republik und Monarchie*, 2nd ed. (Tübingen, 1919); "Die Monarchie in Europa," *Süd-deutsche Monatshefte*, vol. 26 (1929), pp. 841-890 (articles by reactionary historians and journalists on the monarchy in different European states). The indispensable treatise on the juridical status of the crown is Hermann Rehm, *Modernes Fürstenrecht* (Munich, 1904).

2. To this writer's knowledge among recent authors only Guglielmo Ferrero has a clear perception of the situation. He calls the authoritarian monarchy "demo-monarchy"; see the illuminating chapter "The End of Monarchy" in *Peace and War*, pp. 155 ff.; in the note on pp. 180 f. he says: "This confusion seems to have arisen from the fact that demo-monarchies or semi-absolute monarchies possessed Parliaments. It is true that they did, but the existence of a Parliament does not necessarily imply of itself the existence of a parliamentary system. A parliamentary system only exists where Parliament is the controlling power, as in France and England. It does not exist where, as in the case of all demo-monarchies, Parliament is an instrument more or less subordinate to the executive power and whose duty is to check the accounts or to submit remonstrances. In short, before one can tell how a country is really governed, one must determine whether it is Parliament which controls the executive power, or whether it is the executive power that controls Parliament."

3. The majority of Liberals (Progressives) in the Prussian diet, unwilling to accede to the demands of Bismarck and his Conservative cabinet for aggressive armaments, rejected the budget. This case had not been envisaged by the Prussian constitution of Jan. 21, 1850. Bismarck, supported by the army and the officials loyal to the crown, disregarded the parliamentary opposition and governed without budget, under the pseudolegalistic pretext that in cases not explicitly covered by the constitution the crown could fill the gap and act under the general presumption of its prerogative. Vindicating his lawless action by two victorious wars of aggression against Denmark and Austria, he finally obtained parliamentary indemnity. See Karl Loewenstein, in Shotwell, *op cit.*, pp. 306 ff.

4. Law of Oct. 28, 1918 (*Reichsgesetzblatt*, p. 1274). See Karl Loewenstein, *op. cit.*, pp. 336 f.

5. On these aspects of the Weimar constitution see Karl Loewenstein, *op. cit.*, pp. 384 ff.; Arnold Brecht, *op. cit.*, pp. 26 ff., 48 ff. German constitutional theory was proudly conscious of its peculiar version of monarchical constitutionalism, distinguished from the, by comparison, emaciated royal prerogative in the Western kingdoms. In endless variations the belief was reiterated that this was the key for preserving German national singularity in the midst of a democratically perverted world. The study of the constitutions of the German states down to 1918 and of the parallel situation in Austria-Hungary is more revealing even than that of the Imperial constitution of 1871 in which the issue was somewhat obscured by the federal structure.

6. See Petko Stainow, "Das Staatsrecht Bulgariens nach dem Weltkrieg," *Jahrbuch des öffentlichen Rechts*, vol. 24 (1937), pp. 251 ff.

7. George III could still govern with a cabinet to which the Commons were hostile, as shown by Pitt's victory over the majority opposition in 1784 (see Robert Redslob, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form* [Tübingen, 1918], pp. 16 ff.). But when Peel in 1839 refused to accept office because of the bedchamber question and Lord Melbourne was returned to power by the unexperienced Queen Victoria, unable to read, the signs of the time, he could not govern against the hostile Commons. After a new election Peel became Prime Minister (see Redslob, *op. cit.*, pp. 24 ff.).

8. Of the vast literature—increased though hardly enriched on occasion of the resignation of Edward VIII in 1936—only the following are mentioned here: Walter Bagehot, *The English Constitution*, 2nd ed. (1872—reprinted London, 1919), pp. 33 ff.; Sidney

Low, *The Governance of England*, 3rd ed. (London, 1910), pp. 210 ff.; W. Ivor Jennings, *The British Constitution* (New York, 1941), pp. 103 ff.; Harold J. Laski, *Parliamentary Government in England* (New York, 1938), pp. 327 f.; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (first pub. London, 1885), rev. E. C. S. Wade (London, 1939), Introduction, *passim*, and pp. 464 ff. See also John A. Hawgood, *op. cit.*, pp. 152 ff., 284 ff.; Herman Finer, *The Theory and Practice of Modern Government* (London, 1932), pp. 1110 ff.; Kingsley Martin, *The Magic of Monarchy* (London, 1937); Percy E. Schramm, *A History of the English Coronation* (Oxford, 1937); Michael MacDonagh, *The English King* (London, 1929)—see particularly on the republican movement in England—pp. 153 ff.; Richard Henry Gretton, *The King's Majesty* (London, 1930); Hector Bolitho, *Royal Progress* (London, 1937); J. A. Farrer, *Monarchy in Politics* (New York, 1917); John Gore, *King George V* (New York, 1942). It is not without significance that Bagehot and other nineteenth century writers start with the discussion of monarchy while most recent authors on the British constitutional system as a whole relegate its treatment to later chapters.

9. Since 1485: Tudor, Stuart, Orange, Hanover and Saxe-Coburg-Gotha (Windsor since July 17, 1917).

10. *Op. cit.*, p. 11.

11. *Op. cit.*, p. 75.

12. *Op. cit.*, p. 39.

13. The Labor party members of the parliament elect the leader of the party and repeat the performance annually, while the Conservatives leave a leader in office during good behavior (see W. Ivor Jennings, *op. cit.*, p. 104).

14. The action of King George V in the "constitutional crisis" of 1931—actually not a crisis at all but merely a break of normalcy because of Ramsay MacDonald's unorthodox desertion of his party—was less independent than it appeared to be at that time; the king could only turn to the Conservatives. MacDonald's retention as prime minister was an ephemeral courtesy dearly paid for by his subsequent complete eclipse. In 1923 Baldwin had to be chosen instead of Lord Curzon because the latter was a peer. Only in 1924, when the general election of December, 1923, failed to result in a clear majority, did the king have a genuine choice between Liberals and Labor. Churchill's appointment as the man of the hour in May, 1940, was inevitable after Chamberlain's ineptness had become unbearable even for the Conservative majority.

15. See Karl Loewenstein, *Minderheitsregierung in Grossbritannien* (Munich, 1925).

16. The dates of the constitutions are: Belgium, Feb. 7, 1831;

Sweden, June 6, 1809 (frequently amended and modernized); Norway, May 17, 1814 (remodeled after the dissolution of the union with Sweden in 1905); Denmark, June 5, 1915 (a streamlined instrument to fit monarchy into the parliamentary system); Netherlands, Nov. 30, 1887; Luxembourg, Oct 17, 1886 (thoroughly modified in 1919).

17. All genealogical data of this book are taken from that incomparable mine of information, the *Almanach de Gotha* (1940 ed.). Denmark, Christian X (born 1870), in office since 1912 (33 years); Sweden, Gustavus V (born 1858), in office since 1907 (38 years); Norway, Haakon VII (born 1872), in office since 1905 (40 years); Netherlands, Wilhelmina (born 1880), in office since 1898 (47 years)—during her years of minority her mother Emma acted as Regent; Luxembourg, Grand Duchess Charlotte (born 1896), in office since 1919 (26 years). One may here refer to the general phenomenon of the amazing biological resilience of some rulers in our time: Queen Victoria, 1837–1901 (64 years); Francis Joseph of Austria-Hungary, 1848–1916 (68 years); Victor Emmanuel, 1900–1944 (45 years); William II, 1886–1918 (42 years). On the other hand, the occupational risks of kings are considerable; relatively greater numbers have been assassinated than in any other profession. For previous times—for the contemporaries the memory of Alexander of Serbia and Boris of Bulgaria is sufficient—see *Biographie universelle des souverains qui ont péri de mort violente* (Paris, 1820).

18. The literature by both national authors and foreign observers is surprisingly unproductive of genuine information on the actual operation of the monarchical system in the western and northern democratic kingdoms. Most authors deal with the integration of the state through parliamentary institutions. Criticism of the royal establishment is practically nonexistent—which may result from the fact that the republican element in all these countries is wholly insignificant. On the Scandinavian countries see Niels Herlitz and John H. Wuorinen, in Shotwell, *op. cit.*, pp. 939 ff.; Niels Herlitz, *Sweden* (Minneapolis, 1939); Ben Albert Arneson, *The Democratic Monarchies of Scandinavia* (New York, 1939). The best factual information on government and politics in general is found in *Jahrbuch des öffentlichen Rechts*; Maurice Bourquin, "Les Principales Transformations du droit public belge depuis 1914," vol. 18 (1930), pp. 186 ff.; F. J. A. Huart, "Die Entwicklung des öffentlichen Rechts in den Niederlanden seit 1922," vol. 18 (1930), pp. 275 ff. (in both these discussions, otherwise competent, the crown is ignored); J. Himmelstrup, "Das öffentliche Recht Danemarks 1922–1931," vol. 20 (1932), pp. 338 ff.

(he does not mention the king at all); Fred Castberg, "Die verfassungsrechtliche Gesetzgebung in Norwegen in den Jahren 1922 bis 1931," vol. 20 (1932), pp. 360 ff. (he reports that a constitutional amendment in 1931 eliminated the king entirely from the treaty-making power except in a formal capacity—an indication of the retrogression of the royal prerogative even in Scandinavia). For Sweden see also Niels Herlitz, "Die Entwicklung des öffentlichen Rechtes in Schweden in den Jahren 1922-1932," vol. 20 (1932), pp. 366 ff. The Swedish constitution (Arts. 1-49) describes elaborately the powers of the king-in-council, acting through his ministers; even foreign affairs are to be conducted exclusively through the minister of foreign affairs (Arts. 11 ff.); Herlitz devotes a small section to the position of the crown (pp. 381 f.), concluding that it is "evidently much weaker" than under the present ruler's predecessor; he admits, however, that the king appears to possess not inconsiderable influence, particularly in foreign affairs. The constitutional provision that governmental decisions are to be made by the king-in-council has become an empty formality since the King resolves what is proposed to him by his ministers. The British pattern of excluding the king even from the actual political deliberations is approximated in Sweden by the extraconstitutional practice of preliminary discussions of the ministers without the king, the so-called *statsradsberedning*.

19. Information given to this writer by Paul van Zeeland, at that time prime minister.

#### CHAPTER III

1. *Op. cit.*, vol. 2, p. 62.
2. *Op. cit.*, vol. 2, pp. 52 ff.
3. *Principles of Power*, pp. 145 ff. and throughout.
4. The following data, supplementing previously submitted material, must suffice: Sweden, Bernadotte since 1810; Britain, Hanover since 1714; Norway (Danish), Holstein-Sondersburg-Glücksburg since 1905; Belgium, Saxe-Coburg-Gotha since 1831; Rumania, Hohenzollern-Sigmaringen since 1866; Greece, another scion of the Holstein-Sondersburg-Glücksburg since 1863; Bulgaria, Saxe-Coburg-Gotha since 1887; Serbia, Karageorgevich since 1903.
5. The most famous was the "Great Interregnum" (1254-1273); a more recent illustration is Spain from 1868 to 1870 and again from 1873 to 1874 (see Daresté-Delpech-Laferrère, *op. cit.*, vol. 1, p. 450).
6. *Nation*, Feb. 19, 1944, p. 213.
7. The theory of the crown as *pouvoir neutre* is contained in

the pamphlet *Réflexions sur les constitutions et les garanties, avec esquisse d'une constitution*, as reprinted in *Cours de la politique constitutionnelle* (Paris, 1861), vol. 1, pp. 165 ff., on pp. 175 ff. See also J. de la Lombardière, *Les Idées Politiques de Benjamin Constant* (Paris, 1928); Louis Michou, *Le Gouvernement parlementaire sous la Restauration* (Paris, 1905), pp. 152 ff.; Elizabeth W. Schermerhorn, *Benjamin Constant: His Private Life and His Contribution to the Cause of Liberal Government in France* (Boston, 1924); Carl J. Friedrich, *Constitutional Government and Politics* (Boston, 1941), p. 184.

8. He explains (p. 176): "La monarchie constitutionnelle a ce grand avantage, qu'elle crée ce pouvoir neutre dans la personne du roi, déjà entouré des traditions et des souvenirs, et revêtu d'une puissance d'opinion, qui sert de base à sa puissance politique. L'intérêt véritable de ce roi est n'aucunement que l'un des pouvoirs renverse l'autre, mais que tous s'appuient, s'entendent et agissent de concert."

9. *Op. cit.*, p. 526.

10. See, for example, constitution of the Empire of Brazil of Mar. 25, 1824 (text in Dareste-Delpech-Laferrrière, *op. cit.*, 1st ed., vol. 2, pp. 557 ff.), Art. 98: "Le pouvoir modérateur est la clef de toute l'organisation politique; il est délégué exclusivement à l'Empereur comme chef suprême de la nation et son premier représentant."

11. *Wirtschaft und Gesellschaft: Grundriss der Sozialökonomik* (Tübingen, 1922), p. 649: "Es versieht aber der parlamentarische Monarch eine Funktion, welche ein gewählter Präsident nicht erfüllen könnte: er begrenzt das Machtstreben der Politiker formal dadurch, dass die höchste Stelle im Staat ein für alle Male besetzt ist. Diese letzere wesentlich negative Funktion, welche an der blossen Existenz eines nach festen Regeln berufenen Königs als solcher klebt, ist vielleicht rein politisch betrachtet, die praktisch wichtigste." It should be noted that Max Weber favored monarchy only in the very limited sense of its technical utility. He was wholly devoid of any emotional attachment to its German application. See his letter to Hans Ehrenberg of Apr. 16, 1917 (*Gesammelte Politische Schriften*, Munich, 1921, p. 469): "Form of government [*Staatsformen*] are to me techniques like any other machinery." He considered the Hohenzollerns, and particularly William II whom he characterized as a "dilettante d'uncé", (*dillettierender Fatzke*—*op. cit.*, p. 470), as the greatest misfortune of Germany and was one of the first and certainly the most influential in demanding his abdication. In a letter to this writer of Feb. 10, 1917 (*op. cit.*, p. 467), he wrote: "I suffer now less than during these past twenty-

five years when I saw the hysterical vanity of that monarch [Wilhelm II] spoil everything holy and dear to me." Similar condemnations abound in his correspondence. Contrariwise, Weber approved of the British system, in which the monarch exercises political power only if he is a strong personality, and not by virtue of his office alone (*Wirtschaft und Gesellschaft*, p. 649): "The parliamentary monarchy means in England a selection, in the admission to actual power, in favor of a monarch who is qualified as a statesman because a wrong step in internal or foreign policies, or pretensions which are not commensurate to his personal gifts and prestige, may well cost him the crown. In this sense the British monarchy after all is more genuinely charismatically organized than the continental monarchical system which identifies the nincompoop [*Tropf*] with the political genius, merely because he is endowed, by virtue of his hereditary right, with the pretensions of a ruler." (All the passages in English from Weber translated by the present writer.)

12. See Alfred Cobban, *Dictatorship* (New York, 1939), pp. 205 ff.

13. See Karl Loewenstein, "The Influence of Symbols on Politics," in *Introduction to Politics*, ed. Roy V. Peel and Joseph S. Roucek (New York, 1941), pp. 62 ff.

14. That the Western and Scandinavian monarchies resisted totalitarian infiltration—Belgium at least was in great danger of Rexist fascism—is not at all due to the existence of monarchy, but to the democratic loyalty of the people. On the other hand, the Italian monarchy was the first to yield to dictatorship; Primo de Rivera's dictatorship in Spain, 1923–1930 (see Hans Gmelin, "Die Entwicklung des Verfassungsrechts in Spanien 1913–1932," *Jahrbuch des öffentlichen Rechts*, vol. 21 [1933–34], pp. 345 ff.), had the full support of the Crown; all Balkan monarchies turned to dictatorship either in the form of royal absolutism or by permitting military dictatorships.

15. *Modern Democracies* (London, 1921), vol. 2, p. 587.

16. See Georg Jellinek, *op. cit.*, pp. 674 ff.

17. The Soviet regime was threatened by as many as four different monarchist army leaders: Denikin, Kolchak, Yudenich, Wrangel. The executed Marshal Tukhachevsky was said to have been a monarchist.

18. The two military rebellions of the right against the Weimar Republic were led by monarchists, the putsch of Mar., 1920, by Kapp and Generals Lüttwitz and Ludendorff; the Bavarian putsch of Nov., 1923, which coincided with the Hitler putsch, by Generals von Lossow and Seisser and by the avowed monarchist von Kahr

who confessed he was the "place-holder" for the monarchy. On May 1, 1932, the National Union of German Officers (*Nationalverband Deutscher Offiziere*) passed a resolution to the effect that "the restoration of the monarchical form of government under the leadership of the legitimist [*angestammt*] ruling houses is the supreme aim [*Hochziel*] of the Union" (Fritz Pötzsch-Heffter, "Vom Staatsleben unter der Weimar Republic," *Jahrbuch des öffentlichen Rechts*, vol. 21 [1933-34], p. 7).

## CHAPTER IV

1. It is quite illuminating to investigate what exiled monarchs have been doing since their dethronement, either voluntary or enforced, by their people. Napoleon on Elba proved what an active man can accomplish even in a dull place. See on the subject in general John Doran, *Monarchs Retired from Business* (2 vols., London, 1857); Otto Ernst, *Kings in Exile* (London, 1933); Rolf Brandt, *Stätten der Tragik* (Hamburg, 1929); Jonathan F. Scott, *The Twilight of the Kings* (New York, 1938).

2. See the penetrating observations of Jacob Burckhardt, *Weltgeschichtliche Betrachtungen*, 3rd ed. (Stuttgart, 1918), pp. 187 ff. (in translation, *Force and Freedom* [New York, 1943], pp. 287 f.).

3. Law of Aug. 14, 1884, Art. 2. The law of Dec. 9, 1884, made members of the former ruling houses ineligible for the Senate; the law of June 22, 1886, made them ineligible also for all elective functions. For texts see Léon Duguit and Henry Monnier, *op. cit.*, pp. 338 ff.

4. The initiative for the expropriation of the properties of the formerly ruling houses, in answer to the blackmail of the former rulers against the treasuries of the *Länder*, received no fewer than 12,500,000 votes. The actual bill, however, failed to reach the required majority of 14,400,000 votes. See Fritz Pötzsch-Heffter, *op. cit.*, pp. 5 ff., 131 ff.

5. On an official visit he wrote into the Golden Book of the city of Munich his motto: *Suprema lex regis voluntas*. What was worse, the *Oberbürgermeister* had not the courage to tear the page out.

6. An anecdote—perhaps apocryphal—was current under the old Austrian monarchy. It was customary to appoint to the top-ranking positions in the Imperial administration mainly members of the high aristocracy, and this regardless of their professional qualifications, provided they were able to obtain a degree in the regular course of the law school. Such a candidate, shining more by his ancient name than by knowledge of the law, was examined by Franz Klein of the Vienna law school, famous for his caustic wit.



When his patience was exhausted the professor addressed the candidate with the words, "Your Highness, I am unable to prevent your coming appointment to the Regency of Bohemia, but at least I can delay it by one year"—and "flunked" him.

7. Law of Apr. 3, 1919 (*Staatsgesetzblatt* no. 209); text in Hans Kelsen, *Die Verfassungsgesetze der Republik Deutsch-Oesterreich* (Wien-Leipzig, 1919), pt. III, p. 131; see *idem*, "Die Verfassung Oesterreichs," *Jahrbuch des öffentlichen Rechts*, vol. 9 (1920), p. 270. For the sake of the internal security of the republic the former monarch and all members of the Imperial house were banned from Austrian soil unless they had renounced membership in the house, waived all claims to rule derived therefrom and professed themselves as loyal citizens of the republic. Not a few of the vast Habsburg clan availed themselves of republican generosity. The Austrian republic also made an attempt to break down the privileged position of the nobility. See Law of Apr. 3, 1919 (Kelsen, *Verfassungsgesetze*, p. 169) "on the abolition of nobility, the secular orders of Knights and Dames and of certain titles and dignities."

8. Frederick Adams Woods, *Mental and Moral Heredity in Royalty* (New York, 1906), contains much interesting material in spite of its eccentricities and an unsound scientific basis.

9. Among the members of one generation of this old dynasty while this writer was their loyal subject, Prince A was a syphilitic, Prince B a homosexual, Prince C an impotent retired to a monastery, Prince D a schizophrenic—names are odious.

10. Treitschke, a monarchist himself, said of them (*op. cit.*, p. 58): "Or look at the portraits of the Habsburg rulers: everywhere the same intellectual dullness of the heads; they all were clerical kings [*Pfaffenkönige*]."

11. Bella Fromm's *Blood and Banquets* (New York, 1943), otherwise a potpourri of little value, contains some interesting sidelights on the role of the aristocracy in the Nazi "society."

12. The *Almanach de Gotha*, an impeccable source, lists the following cases in 1940: Saxe-Coburg-Gotha (Karl Eduard, born 1884, Obergruppenführer); Oldenburg (Grand Duke Nikolaus, born 1879, SA Standartenführer); Hesse (Philipp, born 1896, Obergruppenführer); Schaumburg-Lippe (Friedrich-Christian, born 1906, SA Obersturmbannführer); Waldeck (Erbprinz Josias, born 1896, SS Obergruppenführer); the *Gotha*, tactful as always, puts these distinctions in quotation marks. Seemingly no member of the former ruling houses of Bavaria, Württemberg, Baden, and Saxony took office with the Nazis.

13. The letters exchanged between Chancellor Schuschnigg and Otto von Habsburg in Feb., 1938, in the eleventh hour before the

*Anschluss*, are extensively referred to by Arnold J. Toynbee in *Survey of International Affairs, 1938* (London, 1941), vol. 1, p. 192. Claiming to be the "legitimate Emperor of Austria," Otto proposed to save the fatherland from the Nazis, but made his mission dependent on being formally appointed Federal Chancellor by President Miklas—which, as he knew well, was impossible. The pitiful correspondence reveals abject Byzantinism in Schuschnigg, and braggadocio tempered by prudent insistence on "legality" in the pretender.

## CHAPTER V

1. For the following<sup>2</sup> see A. Aulard, *Histoire politique de la Révolution Française*, 6th ed. (Paris, 1926), pp. 1 ff., 29 ff., 81 ff.; Maurice Deslandres, *Histoire constitutionnelle de la France de 1789 à 1870* (Paris, 1932), vol. 1, pp. 63 ff., 92 ff.; Karl Loewenstein, *Volk und Parlament nach der Staatsauffassung der französischen Nationalversammlung von 1789* (Munich, 1922), pp. 126 ff.

2. On July 6, 1789, the National Assembly appointed a constitutional commission of thirty members to which Monnier, on July 9, submitted his report of a draft constitution. On July 14 the commission decided to introduce it by a declaration of rights, which, after world-shaking debates (Aug. 17–26), ended with the acceptance of the *Déclaration des Droits de l'Homme et du Citoyen*.

3. In Rumania Couza, an indigenous nobleman, made himself prince in 1864, under the name of Alexander-Jean I, with a fake plebiscite ratifying the coup. In Apr., 1866, Prince Karl of Hohenzollern-Sigmaringen was called to the throne by a so-called plebiscite (685 to 969—a majority of 224 votes!) (see Dareste-Delpech-Laferrrière, *op. cit.*, vol. 2, p. 351). In Bulgaria and Greece the dynasties were elected through national assemblies.

4. Succession Act of Sept. 26, 1810; he accepted Nov. 5, 1810.

5. See Dareste-Delpech-Laferrrière, *op. cit.*, vol. 2, p. 203.

6. The position of the French President, on which most republican state presidents in Europe are patterned, was deliberately modeled on the functions of the constitutional king. See Joseph-Barthélemy, *op. cit.*, pp. 40 ff. ("*esprit de transaction*" between monarchy and republic).

## PART FOUR

## CHAPTER I

1. Winifred N. Hadsel's "Political Currents in Liberated Europe," *Foreign Policy Reports*, vol. 21 (June 1, 1945), pp. 66 ff., a

full coverage of the subject, appeared after this book had gone to press.

2. Bismarck in 1866 could annex Hanover and Frankfort to Prussia because Prussia had won the war against the German Confederation.

3. See Oppenheim-Lauterpacht, *op. cit.*, vol. 2, pp. 485 ff.

4. See Lewis B. Lorwin, *Postwar Plans of the United Nations* (New York, 1943), pp. 125-151.

5. A brief historical sketch may help to understand Hungary's situation. (For literature see two articles by Stephen von Csekey in *Jahrbuch des öffentlichen Rechts*: "Ungarns Staatsrecht nach dem Weltkrieg," vol. 14 [1926], pp. 409 ff., and "Die Entwicklung des öffentlichen Rechts in Ungarn seit 1926," vol. 19 [1931], pp. 199 ff.) The title to the crown acquired by Ferdinand of Habsburg in 1526 is vested in the Habsburg dynasty (statutes of Leopold I of 1687-1688 and the so-called Pragmatic Sanction of 1723). The liberal reforms of 1848 and the *Ausgleich* with Austria of 1867 were conceived as adaptations to historical continuity. From 1867 to 1919 Hungary was a coequal partner in the Dual Monarchy, the Austrian emperor being simultaneously Apostolic King of Hungary. The Treaty of Trianon in 1919 separated Hungary from Austria; the independent state, however, again failed to give itself a new constitution. After the short-lived liberal-republican regime of Michael Karolyi and the Soviet republic in 1919—the latter enacted a full-fledged constitution (June 23, 1919)—a National Assembly convened by the provisional government regularized the situation provisionally and temporarily, with a transcendental twist difficult for non-Hungarians to grasp. The National Assembly could not be based on popular sovereignty because it could not supersede the Estates, considered perpetual and indestructible. King Karoly IV could not formally abdicate; he could only renounce his rights to participate in the direction of the state. The constitutional vacuum was filled by creating a Regency (Law no. 1 of 1920). (For the texts of the laws see Dareste-Delpech-Laferrière, *op. cit.*, pp. 29 ff.) Admiral Horthy, elected Regent for life (Law no. 2 of 1920) was limited to the exercise of such rights of the crown as are attributes of the executive. After the two abortive attempts of the ex-King to regain the throne the Pragmatic Sanction was abrogated and the title of the Habsburgs to the throne declared extinct (Law no. 47 of 1920). The right to select the wearer of the crown reverted to the nation, its exercise was deferred, thus making present-day Hungary a kingdom without a king. Thereafter the parliament and the government under able leaders—the ruling class knows the business of government—proceeded to streamline the political order. The most im-

portant statutes were Law no. 26 of 1925 (election of the deputies of the lower chamber with a fairly wide suffrage, but with secret ballot only in certain larger cities); Law no. 22 of 1926 (on the reform of the Chamber of Magnates) and the new Regent Act, Law no. 19 of 1937 (for text see *Informations constitutionnelles et parlementaires*, no. 14, Sept. 30, 1937, pp. 264 ff.), which devolved the right to choose his successor to the Regent himself, with a limited cooperation of the Parliament, the typical method for the perpetuation of authoritarian governments, resorted to likewise in National Socialist Germany, Poland, Italy, France, and Spain. Horthy's regime was authoritarian; the government could not be overthrown although it was formally operated by multiple parties, and moderate opposition was not altogether impossible. However, the regime was not dictatorial until Horthy, in Mar., 1944, delivered Hungary to the Nazis, with resultant complete coordination. Horthy and his henchmen will claim to have acted under duress. Even if it is conceded that Hungary fared badly under the peace of 1919, it should not be forgotten that the rabid nationalism of her feudal oligarchy has made her a center of unrest for generations.

6. Vargas suspended the Brazilian constitution of 1937 even before it went into operation, and assigned to himself, in the constitution itself, unlimited "emergency" powers for an indefinite term. See Karl Loewenstein, *Brazil Under Vargas* (New York, 1942), pp. 46 ff.

7. See George M. Wunderlich, "Preparing an International Bill of Rights," *Report of Proceedings of the Twenty-first Annual Meeting of the American Branch of the International Law Association* (New York, May 18, 1942) (with references, New York, 1944). Karl Loewenstein, "Dictatorship and the German Constitution," *University of Chicago Law Review*, vol. 4 (1937), pp. 545 ff. The phenomenon is well known in French constitutional theory and practice under the term "deconstitutionalization" through revolution" (see Joseph-Barthélemy, *op. cit.*, p. 227), that is, that provisions of a constitution which have no direct bearing on its political structure continue valid under the succeeding constitution as ordinary law. Two famous illustrations are guarantee of public functionaries, protecting officials against suit without authorization of the plaintiff by the Conseil d'Etat (Constitution of the Year VIII, Art. 75), and prohibition of capital punishment for political crimes (Constitution of 1848, Art. 5).

8. See Karl Loewenstein, "Law in the Third Reich," *Yale Law Journal*, vol. 45 (1936), pp. 802 ff.

9. It is about the limit of constitutional ignorance to contend (see *Neue Volkszeitung* of Jan. 4, 1944, p. 3) that the legitimate

president of Germany is the chief justice of the Reichsgericht who, by an eleventh-hour law of the republic in agony, was named to succeed a defunct or incapacitated Reich president until a new election could be held (see Gesetz über die Aenderung der Reichsverfassung of Dec. 17, 1932, *Reichsgesetzblatt* I, p. 547). Aside from the fact that this was an amendment of the text of the constitution and thus became obsolete with the abolition of the office of the Reich president on Aug. 1, 1934, it would make the legal head of Germany the very man who served as the guilty accomplice of all Nazi crimes from the Reichstag fire down to the present day.

10. The problem has been considered in detail in Karl Loewenstein, "Dictatorship and the German Constitution, 1933-1937," *University of Chicago Law Review*, vol. 4 (1937), pp. 543 ff. The Enabling Act of Mar. 24, 1933, the factual basis of the Hitler dictatorship, was clearly illegal because obtained by pressure and intimidation which alone secured the majority required by the Weimar constitution for a constitutional amendment. Eighty-one Communists and twenty-six Socialists were arbitrarily excluded from the meeting. Moreover, under its own terms the act expired automatically with the withdrawal of the Nationalist members of the cabinet in June, 1933. The subsequent renewals by the subservient Nazi Reichstags (1937, 1939) were likewise illegal, even from the viewpoint of the constitutional "law" of the regime itself. On May 10, 1943, when the last extension had expired, the act was continued "indefinitely" merely by government decree. While these illegalities are irrelevant for the continued validity of the Weimar constitution, they may acquire great practical importance for private claims against Germany after the collapse because, if the enabling acts and their continuations are void, all statutes or decrees enacted on their basis may likewise be considered as inoperative.

11. This was recognized with near-unanimity in 1918 when the democratic revolution displaced the monarchical system. See Fritz Stier-Somlo, *Reichs- und Landesstaatsrecht* (Berlin, 1924), pp. 213 ff.—with abundant literature concerning the controversy on the legality of the actions of the revolutionary Workers Soviets; Walter Jellinek, "Revolution und Reichsverfassung," *Jahrbuch des öffentlichen Rechts*, vol. 9 (1920), pp. 20 ff. It could not be otherwise in 1933 or 1945. On the other hand, Great Britain after the end of the interregnum (1660) returned automatically to the legitimate monarchy because at that time monarchy was the paramount and normal form of government. In 1689 there was merely a change of dynasty and not a change of the political regime.

12. See Deslandres, *op. cit.*, vol. 2, p. 6. In 1870, after the fall of the Second Empire, General Trochu pleaded for the return to the

constitution of 1848, but nobody would hear of it. See Deslandres, *op. cit.*, vol. 3, p. 26.

13. For an appraisal of the achievements and shortcomings of Weimar see Karl Loewenstein, in James T. Shotwell, *op. cit.*, pp. 400 ff.

14. The National Assembly, convened in Vichy on July 10, 1940, made a deliberate and not unsuccessful effort to maintain the legal form of constitutional amendment as prescribed by the constitution of 1875. But the issue has remained controversial ever since. Karl Loewenstein, "The Demise of the French Constitution of 1875," *Amer. Polit. Sci. Rev.*, vol. 34 (1940), pp. 876 ff., concludes that the transition from the Third Republic to Vichy was, on the whole, legal. For the opposite though hardly convincing view of French lawyers see René Cassin, "Un Coup d'état: La Soi-Disant Constitution de Vichy," *La France Libre*, vol. 1 (Dec., 1940, and Jan., 1941), pp. 162 ff., 252 ff.; Pierre Tissier, *The Government of Vichy* (London, 1944), pp. 54 ff. See also Maximilian Koessler, "Vichy's Sham Constitutionality," *Amer. Polit. Sci. Rev.*, vol. 39 (1945), pp. 86 ff. It should be noted that no French court, trying traitors and collaborationists after the liberation, has formally held that the Vichy regime was illegal or unconstitutional.

15. On the Spanish constitution of 1931—one of the most effective democratic constitutions of our time—see Nicolás Pérez Serrano, *Introducción a la Constitución Española* (Madrid, 1932); Luis Jiménez de Asúa, *Proceso histórico de la República Española* (Madrid, 1932); Adolfo Posada, *Le Régime constitutionnel en Espagne* (Paris, 1932); Hans Gmelin, "Die Entwicklung des Verfassungsrechts in Spanien, 1913–1933," *Jahrbuch des öffentlichen Rechts*, vol. 21 (1933–34), pp. 345 ff.

16. Art. 62, Sec. 2. The commission consisted of twenty-one deputies of the Cortes, elected by the parties in conformity with their relative strength. It was to function primarily when the plenary Cortes was not assembled (Art. 80), and the constitutional guarantees were suspended (Art. 42). On the permanent commission see the excellent monograph *La Comisión permanente* (Biblioteca de Publicaciones Oficiales de la Facultad de Derecho de Montevideo, Montevideo, 1943), vol. 1, pp. 462 ff.

17. It consisted of twelve members, thus constituting the legal quorum, and included five parties of the left, among them the Basques and the Catalans. The Communists had not participated since 1940. As early as 1937 the Cortes had the seats of the parties of the right declared vacant because of their continued absence from the sessions.

18. The theory advanced recently that Hanover belongs of right

to the British crown and should come again under British jurisdiction, is too absurd to merit refutation. The kingdom had passed, on the death of William IV (1837) to the Duke of Cumberland, eldest surviving son of George III. After the annexation by Bismarck in 1866, a separatist party, the Guelphs, agitated against Prussia, but lost strength in the next generation. An initiative, undertaken in 1924 in accordance with Art. 18 of the Weimar constitution and aimed at establishing Hanover as a separate *Land*, found so little support among the voters that it had to be dropped. (See Fritz Pötzsch-Heffter, "Vom Staatsleben unter der Weimarer Verfassung," *Jahrbuch des öffentlichen Rechts*, vol. 13 [1925], p. 56.)

19. Space forbids dealing with the merits of the various proposals for splitting up Germany after the war. (See, among many others, Sumner Welles, *The Time for Decision* [New York, 1944]; *How to End the German Menace: A Political Proposal by Five Hollanders* [New York, 1944].) They all suffer from two major defects. One is that the parts to be carved out are necessarily of unequal economic resources, a disadvantage which no map redrawing can eliminate. To those who wish to cripple Germany's economic potential for reasons of international security—a wholly justifiable ground—this very aspect may be attractive. But it should be borne in mind that those parts of an artificially dismembered Germany which have not enough industrialization will become pensioners of the others, or of Europe at large, as Austria was between the two World Wars. Contrariwise, the overindustrialized and overpopulated sections would be dependent on import of food and fodder from the other parts or from abroad. Even if these handicaps could be overcome by a rational process of industrial relocation and agricultural rationalization, a second difficulty is insoluble; namely, the lack of affinity among those sections of the people which are to be thrown together. The Rhineland and Westphalia will find it as difficult to get along with the Saxons, as the Hanseatic population with the Prussians. Moreover, what is commonly called Prussia is far from being ethnically and spiritually homogeneous. This writer is not in favor of dismemberment. But if it should prove to be inevitable he would advocate a regroupment along the traditional and historical lines. In this case the people at least would know what to expect. Existing centrifugal forces inside Germany should be carefully watched by the Allies and, if genuine, should by no means be discouraged. The so-called Morgenthau plan, which envisages the transformation of an intensely industrialized country into a purely agricultural land, cannot be judged unless it is known how sixty million people can be fed on their own notoriously insufficient soil, without either manufactures to export

in exchange for food, or forcible decimation in the exact sense of the term. Our respected Secretary of the Treasury and Emil Ludwig are strange bedfellows.

20. The legal situation of some of the governments-in-exile has been thoroughly and satisfactorily explored by various articles in the *Journal of Comparative Legislation and International Law*: see "Legislation in Exile: Norway," *op. cit.*, vol. 24 (1942), pp. 125 ff.; Henri Fayot, "Legislation in Exile: Belgium," vol. 25, pts. 3-4 (Nov., 1943), pp. 30 ff.; Ernest J. Cohn, "Legislation in Exile: Luxembourg," vol. 25, pts. 3-4 (Nov., 1943), pp. 40 ff.; Egon Schwelb, "Legislation in Exile: Czechoslovakia," vol. 24 (1942), pp. 120 ff.; Manfred Lachs, "Polish Legislation in Exile," vol. 24 (1942), pp. 57 ff. For Greece see Basil Vlavianos, "Behind the Greek 'Mutiny,'" *Nation*, May 13, 1944, pp. 566 ff. For an excellent overall survey see Bogdan Raditsa, "Europe in Exile," *Nation*, May 27, 1944, pp. 616 ff., and "The Rebirth of Europe," *Nation*, June 4, 1944, pp. 645 ff. See also F. E. Oppenheimer, "Governments and Authorities in Exile," *Amer. Jour. of International Law*, vol. 36 (1942), pp. 568 ff.

## CHAPTER II.

1. Badly as it is needed for political reconstruction in Europe, there is unfortunately no comparative study of provisional governments and national assemblies. The following unpretentious illustrations serve only to point out some precedents, parallels, and perhaps conclusions useful at this time. The material is based on authoritative constitutional histories of the various countries. The presentation raises no claim whatever to being original research.

2. *Weltgeschichtliche Betrachtungen*, ed. Carl Öri, 3rd ed. (Stuttgart, 1918), p. 190. Of the restoration of exiles after the fall of political regimes he says: "It would be desirable that the émigrés should never return, or at least should never return with claims of reparation; that they should accept what they have gone through as their part of human destiny, and should recognize a statute of limitation which renders its decisions not only in terms of years but according to the magnitude of the break with the past."

3. The example of Count Sforza, more prominent than any of the German refugees and genuinely democratic at that, is none too encouraging. The case of the Spanish republican refugees is different, because they have actually fought against fascism and not only by words and newspaper articles.

4. In the United States the Foreign Agents Registration Act of 1940—52 Stat. 631 (1938), amended by 53 Stat. 1244 (1939), 22



U.S.C. § 233 a to 233 g (Suppl. 1940)—should have been applied to compel free movements to disclose the financial resources at their disposal and, thus, to check on the wirepullers operating them. In Latin American states control was somewhat more effective because they are subject to the frequently stringent restrictions on foreign associations.

5. For example, practically all free movements are reluctant to endorse complete disarmament of defeated Germany. Motivations differ according to political coloration. The Communist groups desire a Germany kept strong for the fight against capitalism at the side of the Soviets while the Socialists-in-exile prefer a strong Germany for the fight against Bolshevism. No less equivocal is the attitude toward other problems, such as transfer of German population from the neighboring countries, use of German labor for reparations, eventual dismemberment of Germany, and boundary rectifications and annexations. In general it can be said that many among the German free movements, though profoundly anti-Nazi, remain as intransigently German as the Nazis themselves.

6. The facts are gathered from the standard work by Maurice Deslandres, *op. cit.*, vol. 1, pp. 633 ff.

7. The ordinance of June 10, 1814, on the liberty of the press was as effective an instrument for muzzling public opinion as Napoleon's famous decree of Feb. 5, 1810. The press law of Oct. 21, 1814, was not much better. See Deslandres, *op. cit.*, p. 718.

8. For the following see Deslandres, *op. cit.*, p. 735 ff.

9. Among the faithful were Cambacérès, Mollien, Decrès, Davout, Carnot, Maret, and the inevitable Fouché, whom he had dismissed in 1810. Although he was aware of Fouché's shady dealings with the Bourbons he could not dispense with him as Minister of Police because Fouché alone knew the contents of the secret dossiers.

10. For its text see Duguit and Monnier, *op. cit.*, pp. 190 ff. For an evaluation see Deslandres, *op. cit.*, pp. 749 ff.

11. The vote in the plebiscite was 304,306 to 4,206 (Deslandres, *op. cit.*, p. 764). The affirmative majority in the Imperial plebiscite had been three times as great. Only half the qualified voters turned out. The elections were orderly and without pressure.

12. For the following see Deslandres, *op. cit.*, vol. 2, pp. 4 ff.

13. Deslandres, *op. cit.*, p. 7, ascribes to Wellington more influence on events than he actually may have had. As a soldier he favored practical solutions, and the restoration of the Bourbons recommended itself more than a Regency of Napoleon II or any other alternative. However, the moving spirit was Talleyrand even though the actual decisions were taken by Wellington.

14. Fouché's role is intelligently pointed out by R. G. Waldeck, *Meet Mr. Blank* (New York, 1943), pp. 98 ff.

15. The name was taken from the color of the Bourbon flag and the white cockade of the royalist party. Reprisals were directed against everything stemming from the Napoleonic era. The promise of the Royal Proclamation of Cambrai that only criminal acts prior to Mar. 23, 1815, were punishable, and that the Chamber had to designate those to be prosecuted (Deslandres, *op. cit.*, p. 13), was disregarded. Among the retaliatory statutes passed by the royalist majority of the Chambers the following deserve to be mentioned because they interestingly prelude present-day legislation for the defense of the state: Law of Oct. 31, 1815, "on general security"; Law of Nov. 9, 1815, against "cries, seditious speeches and provocation of rebellion" (it punished all acts of antistate propaganda); Law on the *Cours Prévotales* of Dec. 20, 1815, establishing military courts for dealing with offenses committed under the emergency statutes. From the amnesty act of Jan. 12, 1816, whole categories of "criminals," carefully listed in Fouché's incomparable dossiers, were excluded. Ney was executed; other Napoleonic generals were under prosecution—a valuable precedent which the United Nations after this war could use to their advantage against the surviving generals of the Wehrmacht, who are as much responsible for Hitler's assault on civilization as the Nazis themselves. Legislative terror was recurrent throughout the period of the second restoration (see Law of Apr. 20, 1825, punishing by death those who had committed sacrilegious acts; Law of Apr. 27, 1825, on the indemnity for the former owners of confiscated state property).

16. The entire electorate consisted of 72,000 voters; only 52,000 participated; the ballot was indirect by electoral colleges; the elections were flagrantly manipulated by the prefects.

17. For text see Duguit and Monnier, *op. cit.*, p. 298.

18. For the following see Deslandres, *op. cit.*, vol. 2, pp. 723 ff.; vol. 3, pp. 4 ff.

19. For the understanding of the political situation in France prior to the war against Prussia it should be remembered that the last elections of May and June, 1869, had resulted in 199 official government representatives and 99 members of the opposition (the popular vote was 4,500,000 to 3,500,000; in Paris itself the popular majority was against the government, 234,000 to 77,000).

20. The vote was 557,000 to 62,000 (Deslandres, *op. cit.*, vol. 3, p. 14).

21. Among the first measures were: suppression of the Council of State, abolition of the *Corps Législatif* and the Senate, amnesty for political crimes committed under the Empire; replacement of

the majority of the *procureurs généraux* and of many other high officials by republicans and men of the new order. See Deslandres, *op. cit.*, vol. 3, p. 5.

23. In view of the subsequent events the text of the armistice agreement is of importance (see Deslandres, *op. cit.*, vol. 3, pp. 48 ff.): ". . . pour but de permettre au Gouvernement de convoquer une Assemblée librement élue, qui se prononcerait sur la question de savoir si la guerre devait être continuée ou dans quelles conditions la paix devrait être faite."

23. See Jules Favre's interview with Bismarck on Sept. 18, 1870. Negotiations were still under way in Jan., 1871, to induce Bismarck to recognize ex-Empress Eugénie as the legitimate regent for France. In this capacity she was prepared to conclude peace with Germany. See Hermann Oncken, *Grossherzog Friedrich I von Baden und die deutsche Politik, 1854-1871* (Stuttgart) vol. 2, p. 314. The author is indebted for this reference to Prof. F. C. Sell of Mount Holyoke College.

24. On Oct. 27, 1940, General de Gaulle formed the Council for the Defense of the Empire which, since May 31, 1943, has called itself the French Committee of National Liberation.

25. Ordinances of Sept. 17 and Dec. 6, 1943, published by the French Press and Information Service, New York, Special Issue No. 1 of Mar. 30, 1944.

26. Of these, 49 were delegated into it by the French National Resistance Council (formed inside France in May, 1943); 20 members were taken from the former French Parliament, in proportion to the respective strength of political parties composing it in 1936; 21 from the Resistance outside metropolitan France, and 12 members to be delegated after liberation by the *Conseils Généraux*. The parliamentary group embraced three Communists, ten members of the left and the moderate left, and seven members of the center and the right.

27. The text of the decree of Oct. 11, 1944, was not available; but the powers of the assembly were not increased by it.

28. Resolutions of Nov. 10 and 18, 1943.

29. Série II, No. 866 F. Copy was obtained by courtesy of the French Press and Information Service in New York.

### CHAPTER III

1. General Monk at first tried to restore legal continuity by reconvening the Long Parliament, adding the surviving Presbyterian members purged by Pride (Dec. 6 and 7, 1648). But this most unusual procedure did not work. In Apr., 1660, the so-called Convention Parliament was elected which proclaimed Charles II

King on May 8. The Convention of "Lords, Citizens, Knights and Burgesses" received its authorization as Parliament only after the King's return to power. It was dissolved on Dec. 29, 1660. The precedent was followed after King James II, fleeing from London, threw the Great Seal into the Thames—an action which made constitutional government formally impossible (Dec. 11, 1688). Another Convention Parliament, summoned by advice of the Lords (Jan. 22, 1689), was altogether revolutionary. This, however, did not detract from its fame: it issued the Declaration of Rights (Feb. 13). On Feb. 22 it converted itself into the regular parliament, confirmed by Royal Act. On the constitutional problems involved see Egon Zweig, *Die Lehre vom Pouvoir Constituant* (Tübingen, 1909), pp. 48 ff.

2. *Kemper v. Hawkins*, 3 Va. 20, 68.

3. On the conventions see Roger Sherman Hoar, *Constitutional Conventions* (Boston, 1917); W. F. Dodd, "The First State Constitutional Conventions," *Amer. Polit. Sci. Rev.*, vol. 2 (1907), p. 545. The classic on the subject is John Alexander Jameson, *A Treatise on Constitutional Conventions*, 4th ed. (Chicago, 1887). On the rise of the convention practice see also Homer Carey Hockett, *The Constitutional History of the United States* (New York, 1939), vol. 1, pp. 113 ff.

4. The exceptions were Virginia (where the provincial convention, acting as revolutionary and provisional government, had put the constitution into force), South Carolina, and New Jersey.

5. Hoar, *op. cit.*, p. 3.

6. Hoar, *op. cit.*, pp. 214 ff.

7. The delegates to the First Continental Congress, meeting in Philadelphia on Sept. 5, 1774, were not even elected; they were chosen mainly by the committees of correspondence, a remote parallel on the intellectual levels of the resistance movements. See Hockett, *op. cit.*, pp. 98 ff. The Second Continental Congress also was irregularly chosen.

8. Hockett, *op. cit.*, pp. 147 ff.

9. The Annapolis meeting of Sept., 1786, owed its existence to the initiative of the governor of Virginia acting on instructions from his legislature. The Philadelphia meeting had the approval of Congress only in so far as the Resolution of Feb. 21, 1787, had authorized the consideration of a revision of the Articles of Confederation. The delegates to Philadelphia were chosen by the state legislatures (Hockett, *op. cit.*, p. 230). All told, seventy-four delegates were appointed; the maximum number attending was fifty-five.

10. The first draft was submitted by the committee of detail on Aug. 6, 1787; thereafter debated article by article until Sept. 7.

The committee on style took only four days more (Sept. 8 to 12), with four days of further debate added (Sept. 13 to 17). (See Hockett, *op. cit.*, p. 209, n. 10.)

11. The official records, scanty as they were, were not published until after the War of 1812. Madison's privately taken notes were not printed until 1840.

12. It has been figured out that, in a country of about 4,000,000 inhabitants, only 160,000 voters pronounced themselves on the constitution by electing delegates to the state conventions. See Charles W. Gerstenberg, *American Constitutional Law* (New York, 1937), p. 11.

13. On application of two-thirds of the legislatures of the several states a federal convention shall be called for proposing amendments. A federal convention has not been called for any of the twenty-one amendments to date. On its own initiative, Congress is not authorized to call it (see Lester Bernard Orfield, *The Amending of the Federal Constitution*, Chicago, 1942, pp. 40 ff.). In every case, when Congress by two-thirds majorities votes the amendment, the states are entitled to have conventions decide on the amendment, instead of their ordinary legislatures. This method, not having found much favor among the states, was used only once—for the repeal of the Twenty-first Amendment (1933).

14. The facts are assembled from Deslandres, *op. cit.*, vol. 3, which is devoted almost entirely to the work of the National Assembly. See also the summary by Joseph-Barthélemy, *op. cit.*, pp. 7 ff.

15. So discredited was the Empire that only 6 members voted against the dethronement of the Bonaparte dynasty. However, Bonapartist members, calling themselves *groupe de l'appel du peuple*, increased through by-elections to about 30. Joseph-Barthélemy (*op. cit.*, p. 11) gives the total of deputies as 768 and, after the withdrawal of the Alsatians and Lorrainers, as 738.

16. Paris again outdistanced the provinces in radicalism. Louis Blanc headed the Parisian delegation by a majority of 216,630 votes.

17. Thiers was seventy-three years old when elected. Author of the monumental *Histoire de la Révolution Française*, liberal leader of the July Revolution, frequently minister under Louis Philippe, champion of order after 1848, without becoming involved in the policies of the pretender, he had been imprisoned for some time during the Empire and entered the *Corps Législatif* in 1863 as one of the leading opponents of the dictatorship. But he kept aloof from the Government of National Defense, saving himself for more important tasks.

18. Joseph-Barthélemy, *op. cit.*, p. 14.

19. Deslandres, *op. cit.*, pp. 137 ff.

20. After acrimonious dissensions the two legitimist sections, Bourbon and Orléans, united in support of the Count of Chambord, grandson of Charles X; but he insisted on being King "of France" and not King "of the French people." A silly irony of history willed it that the stumbling block became the question of the national flag. A badly educated prince took the fleur-de-lis as the symbol of Henry IV and Jeanne d'Arc (on this point see Joseph-Barthélemy, *op. cit.*, p. 21), and repudiated the tricolor, soiled, as his warped mind believed, by the French Revolution—another proof of the hereditary gift of self-stultification of the Bourbons. One remembers that the conflict between the republican black-red-gold flag and the Imperial flag split the Weimar republic also until the swastika was substituted.

21. The elections for the *Conseils Généraux* of Oct. 8 and 15, 1871, had brought a two-to-one majority for the republicans (Deslandres, *op. cit.*, vol. 3, p. 156). On the by-elections of 1873 see Deslandres (*ibid.*, p. 203).

22. The commission went to work without haste and without enthusiasm. For the purposes of our study it is noteworthy that it proposed first to familiarize itself with the theory of constitutional government in other countries. Laboulaye, eminently qualified for the task, was charged to submit a study of the American constitution; Waddington was to examine more comprehensively the constitutional legislation of other foreign countries. Later the commission listened to an erudite study of Lefèvre-Pontalis on the comparative law of second chambers (Joseph-Barthélemy, *op. cit.*, p. 23). In general the assembly cannot be accused of intellectual provincialism. Interest in foreign political experience characterized the constitutional debates throughout (see Deslandres, *op. cit.*, p. 282).

23. See Deslandres, *op. cit.*, pp. 292 ff.

24. From 1871 to the end of 1874, 158 by-elections were held; the republicans won 126, the legitimists 22, and the Bonapartists 10 (Deslandres, *op. cit.*, p. 302).

25. See Deslandres, *op. cit.*, pp. 324 ff.; Joseph-Barthélemy, *op. cit.*, p. 24. However, in a second vote, on Feb. 3 the Wallon amendment was accepted by 425 to 243.

26. These were the Laws on the Relations of the Public Powers of July 16, on the elections of the Senators and Deputies of Aug. 2 and Nov. 30, 1875, respectively.

27. For general information see Théodore Juste, *Le Congrès National de Belgique, 1830-1831* (2 vols., Brussels, 1880); De Bus de Warnaffe and Carl Beyert, *Le Congrès National* (published on the centenary of the constitution, Brussels, 1930); Heinrich Pohl, *Die*

*Entstehung des Belgischen Staates und des Norddeutschen Bundes* (Tübingen, 1905);<sup>1</sup> Dareste-Delpech-Laferrière, *op. cit.*, vol. 1, pp. 346 ff.

28. The majority were middle-class people, with prominent representation of the professions. Thirty-four members had served previously in the States-General; about one-half had legal training. The aristocratic element, not uprooted by the expropriations of the French Revolution, was strong, and only a few deputies were ancient Jacobins. The majority were thirty-five to forty-five years old.

29. The constitutional commission had pronounced itself (one member disagreeing) for this solution. In Congress the republican form of government found only ten supporters.

30. No imperative necessity for a new electoral law existed in the Reich, which could have made the older law of 1869 fully serviceable by connecting it with a redistribution of seats according to the progressing urbanization. Proportional representation, an insistent socialist demand, was first introduced in some of the larger constituencies in the very last days of the Empire (see Law of Oct. 24, 1918, H. Triepel, *Quellensammlung des deutschen Reichsstaatsrechts*, 3rd ed. Tübingen, 1922, p. 327). Prussia substituted the electoral system of the Reich for the outrageously unjust law of three classes which for two generations had secured the control of the landowning and capitalist classes over the Prussian Diet.

31. See Franz Weyr, "Der Tschechoslovakische Staat," *Jahrbuch des öffentlichen Rechts*, vol. 10 (1921), pp. 351 ff.; Dareste-Delpech-Laferrière, *op. cit.*, vol. 2, pp. 811 ff.; Joseph Blociszewski, "La Constitution tchécoslovaque," *Revue des Sciences politiques*, vol. 45 (1922), pp. 217-247.

32. Czech independence began with the manifesto of the Action Committee of Czechs abroad in 1915. Soon thereafter the committee transformed itself into the Czechoslovak National Council under Masaryk, with its seat in Paris. Early in 1917 Czech independence became an official war aim of the Allies. On Dec. 16, 1917, the French government authorized the formation of an autonomous Czech army under the National Committee. In 1918 the National Committee was officially recognized as belligerent.

33. Admission of the Germans and Hungarians would have frustrated the whole plan. Fourteen Slovak members, delegated by the Slovak National Council, were added somewhat later (Law of Mar. 11, 1919). See Dareste-Delpech-Laferrière, *op. cit.*, vol. 2, p. 816.

34. In Germany after the collapse of the Empire the provisional government of the *Rat der Volksbeauftragten* (Council of People's Commissioners) lasted from Nov. 9, 1918, to the convening of the National Assembly, Feb. 6, 1919. Ebert and his associates formally

resigned their powers into the hands of the National Assembly. See Fritz Stier-Somlo, *op. cit.*, pp. 162 ff.; Walter Jellinek, "Revolution und Reichsverfassung," *Jahrbuch des öffentlichen Rechts*, vol. 9 (1920), pp. 3 ff. The only case in which a revolutionary provisional government tried to perpetuate itself—and failed—was in Bavaria. On this situation see *infra*, pp. 272 f.

35. See Joseph-Barthélemy, *op. cit.*, pp. 148 ff.

36. The Convention solved the problem in practice by delegating the executive powers to a *Conseil Exécutif Provisoire* which in turn was closely supervised by two committees of the assembly (*Comité du Salut Public* and *Comité de Surêté Générale*). See A. Aulard, *Histoire politique de la Révolution Française*, 6th ed. Paris, 1926), pp. 327 ff. It is common knowledge that in due course these committees eclipsed the ministers and had them replaced by twelve executive commissioners elected by the Convention, and the Convention itself. The system led to the *terreur* and ended with the Ninth of Thermidor.

37. See Deslandres, *op. cit.*, vol. 2, pp. 326 ff. The committee, consisting of Arago, Garnier-Pagès, Marie, Lamartine, and Ledru-Rollin, formed a "directory" as a sort of cabinet, but remained strictly subordinated to the Assembly.

38. *Gesetz über die vorläufige Reichsgewalt* (see Stier-Somlo, *op. cit.*, pp. 200 ff.; text in Triepel, *op. cit.*, p. 17). The statute was a workable constitution in a nutshell. Containing no date for its expiration, it was repealed formally by the Weimar constitution, together with the Imperial constitution of 1871 (Art. 178).

39. Thuringia dispensed with calling a National Assembly. The situation differed from that in other German states because in 1919 the revolutionary governments of eight small principalities in this region had concluded a "community treaty" merging the principalities into the *Land* Thuringia. The joint legislative assembly was the *Volksrat*, composed of forty-two deputies from the eight states—not elected for this purpose but delegated, according to the strength of the political parties represented in the eight parliaments, by the legislative bodies of the individual states (see Eduard Rosenthal, *Jahrbuch des öffentlichen Rechts*, vol. 9 [1920], pp. 237 ff., vol. 10 [1921], pp. 266 ff.). The situation, thus, was similar to that of Czechoslovakia (see *supra*, pp. 269 f.).

40. No details can be submitted here. Prussia: *Gesetz zur vorläufigen Ordnung der Staatsgewalt in Preussen* of Mar. 20, 1919 (see Hugo Preuss, *Jahrbuch des öffentlichen Rechts*, vol. 10 [1921], pp. 222 ff.). Hesse: Law of Feb. 20, 1919 (see Hans Gmelin, *Jahrbuch des ö. R.*, vol. 9 [1920], pp. 208 ff.; text of the statute *ibid.*, pp. 216–217). Baden: No interim constitution was required be-



cause the National Assembly was satisfied with the provisional government's continued exercise of the legislative and executive functions (assumed by decree of Nov. 18 and 20, 1918—see Otto Köllreutter, *Jahrbuch des ö. R.*, vol. 9 [1920], pp. 180 ff.). Because this little country was at the time extraordinarily democratic, there was no danger that the government would abuse its powers. Baden was the first German *Land* to complete its constitution and reach constitutional normalcy. Württemberg likewise omitted to enact an interim constitution and was second to complete its constitution (see Wilhelm von Blumę, *Jahrbuch des ö. R.*, vol. 9 [1920], pp. 171 ff.). Saxony passed a very elaborate provisional constitution by Law of Feb. 28, 1919 (see Erwin Jacobi, *Jahrbuch des ö. R.*, vol. 9 [1920], pp. 163 ff.; for text see *ibid.*, pp. 169 ff.). In Thuringia the situation was irregular because, as previously remarked, the fusion of the eight small principalities was accomplished without a National Assembly. The final constitution was enacted as a "preliminary" and subsequently entered into force under a federal statute (Art. 18, Sec. 2 of the Weimar constitution—see Eduard Rosenthal, *Jahrbuch des ö. R.*, vol. 9 [1920], pp. 237 ff., vol. 10 [1921], pp. 266 ff.).

41. The factual material, taken from Robert Piloty, *Die Bayerische Verfassung vom 14. August 1919*, *Jahrbuch des ö. R.*, vol. 9 (1920), pp. 129 ff., is supplemented by the personal experience of the author.

42. For text see Piloty, *op. cit.*, pp. 135-136.

43. After Eisner's assassination a rump Diet drafted another interim constitution (Mar. 17, 1919) along customary lines of the subordination of the provisional government to the Landtag (see Piloty, *op. cit.*, pp. 141 ff.).

44. See Hans Kelsen, "Die Verfassung Deutsch-Oesterreichs," *Jahrbuch des ö. R.*, vol. 9 (1920), pp. 245 ff.

45. *Gesetz über die Staats- und Regierungsform* of Nov. 12, 1918, Kelsen, *op. cit.*, p. 256.

46. German-Bohemia and the Sudetenland had constituted themselves as parts of German-Austria on Oct. 29 and Nov. 16, respectively. The law "on the territorial demarcation of German-Austria" of Nov. 20, 1918, included also German-South-Moravia; German-South-Bohemia, the German settlements around Brünn, Iglau, Olmütz. But the Czechs were quicker at the trigger and frustrated a settlement which would have anticipated Munich of 1938.

47. It consisted of the law on the popular representation (*Volksvertretung*) and the law on the government of the state (*Staatsregierung*) (*Staatsgesetzblatt*, nos. 179, 180). See Kelsen, *op. cit.*, pp. 268 ff.

48. Czechoslovakia: Law no. 37 of Nov. 18, 1918 (for text see Leo Epstein, *Studienausgabe der Verfassungsgesetze der Tschechoslovakischen Republik*, Prague, 1923, pp. 117 ff.; Malbone W. Graham, *New Governments of Central Europe*, New York, 1925, p. 611). The provisional constitution was issued by the National Committee and not by the National Assembly (see Weyr, *op. cit.*, p. 353, and Dareste-Delpech-Laferrière, *op. cit.*, vol. 2, p. 816). In Estonia the National Assembly confined itself to two specific purposes—the drafting of the constitution, and the preparation of agrarian reform legislation—while ordinary legislation was entrusted to a committee of the National Assembly, proportionally elected by it (law of July 15, 1919): a rather original and intelligent solution. The interim constitution is of Mar. 1919 (see Eduard Behrendts, *Jahrbuch des ö. R.*, vol. 12 [1923-1924], pp. 191 ff.). Poland: General Pilsudski had inherited his powers from the semi-official Council of Regency, formed by the Central Powers in 1917 and invested with restricted authority until the German and Austrian governments should agree on the person of the future sovereign. On Nov. 11 and 14, 1918, the council transferred all its powers to Pilsudski until the convocation of a constituent assembly. Pilsudski by decree of Nov. 21, in what may be considered as the embryonic organization of the provisional government, assumed the powers of Chief of State and appointed the cabinet. It was a wholly authoritarian arrangement, sufficient to carry the government over to the National Assembly convened on Feb. 9, 1919. In its third meeting Pilsudski resigned his powers to the assembly. On Feb. 20 the constituent assembly passed the "little constitution." Following French precedents, the Sejm assumed the plenitude of powers until the completion of the constitution. Pilsudski was reelected Chief of State, but he and the ministers appointed by him remained responsible to the assembly. Since the Sejm could be dissolved only by its own decision, Poland was actually governed by the dictatorship of an assembly. The interim constitution remained longer in force than in any other country because, for internal and external reasons, the Polish constitution went into operation as late as June 1, 1921 (for literature see Dareste-Delpech-Laferrière, *op. cit.*, vol. 2, pp. 271 ff., Joseph Blociszewski, "La Constitution polonaise," *Revue des Sciences Politiques*, vol. 45 [1922], pp. 28 ff.).

49. The constitutional history of Greece is particularly rich in abortive constituent assemblies which either failed to complete a draft constitution or wrote one which could not be applied. There were no fewer than five different constituent assemblies in the early 1820's after the rebellion against the Turks (Dareste-Delpech-Laferrière, *op. cit.*, vol. 1, pp. 621-622). The third national assembly con-

voked after the First World War accomplished nothing. The fourth national assembly, convening on Jan. 2, 1924, proclaimed the republic and deposed the dynasty, and charged a commission of forty members with the drafting of a constitution. In June, 1925, by a rare act of self-denial and humility, the assembly transferred irrevocably to the commission the task of drafting the constitution, reserving for itself only the right to ratify it after completion. This constitution was put into force by the dictatorship of Pangalos, with proper modifications to serve its aims. See Dareste-Delpech-Laferrière, *op. cit.*, p. 624.

50. In Austria the coalition between the leading parties, Socialists and Clericals, broke down in June, 1920. The constituent assembly was not able to form a government; nor could it be dissolved by act of the government. The constitution under deliberation was still far from being completed. A way out of the dilemma was sought by shortening the national assembly's originally fixed duration by four months in order to permit election of a new national assembly. However, in the eleventh hour, the constitutional commission of the assembly found compromise solutions for the most controversial problems (federal structure and bill of rights) and completed the draft before the expiration of the national assembly's term (see Hans Kelsen, *Jahrbuch des ö. R.*, vol. 11 [1922], pp. 232 ff.).

In Poland the framing of a constitution was particularly hectic, partly because of unsettled international conditions, partly because of the conflict between the bourgeois parties and the Socialists. The constitutional commission, consisting of thirty members, was swamped with projects emanating from the various parties, the government, and private sources. The government of Pilsudski at first submitted a "Constitutional Declaration," patterned on the old Polish constitution of 1791. Wholly unworkable, it was abandoned for a new project, elaborated at the request of the Paderewski cabinet, by a group of constitutional lawyers and other persons of prestige (Nov. 4, 1919). Paderewski's successor proposed basic changes (Jan. 20, 1920) which again complicated the situation. In addition, the commission had appointed eight different reporters belonging to the eight principal parties, who disagreed at practically every point. Four other draft constitutions were submitted by political parties to which the commission devoted more than a hundred meetings (see Blociszewski, *op. cit.*, pp. 36-37). To reconcile these conflicting projects was a Herculean task which finally resulted in the submission of a compromise project (July 8, 1920) reflecting the majority opinion. The second deliberation by the Sejm, interrupted by the Russian war, took no fewer than eight

months; the most controversial points were the bicameral system, the Senate, the function of the Head of State as commander-in-chief, the relations with the church, amendment procedures, position of minorities. A complete deadlock ensued. On Dec. 10, 1920, the Socialists succeeded in defeating the entire project by a vote of 183 to 180. The commission again had to seek the greatest common factor. Finally, after the third reading (Mar. 8-16, 1921) the constitution was accepted *en bloc* by a large majority (Mar. 17). It went into force on June 1. No other constitution except the French effort of 1871 was beset with such difficulties.

51. The following data must suffice. German Reich: Hugo Preuss's first draft had been under discussion by the Reich authorities, the Central Committee of the Soldiers and Workers Councils, and the governments of the *Länder* since Jan. 20, 1919. A second official draft was submitted by the government on Feb. 17; it conformed more to the federalistic tendencies than the first unitary draft. Four plenary sessions were devoted to it by the assembly. The constitutional commission worked on it from Mar. 5 to June 18; it reported its third official draft to the plenary meeting on July 2. The second reading occupied fourteen plenary sessions (to July 22); the third reading, three sessions (July 29-31). The constitution was adopted (July 31) by a vote of 262 to 75 (the German Nationalists and the Independent Socialists dissenting).

Most of the constitutions of the *Länder* were delayed because their position depended on the federal solutions adopted by the Reich. Consequently, the first draft of the Prussian constitution was submitted on Feb. 25, 1920. The situation was more complicated in Prussia than in other parts of the Reich because the Reich constitution subjected that state to a large-scale decentralization which aroused great objections. The constitutional commission began work not before June 16, 1920. In contrast to other assemblies, it deliberated extensively in plenary session on the draft submitted by the commission. The constitution was at last adopted on November 20, 1920, by a vote of 280 to 60 (the German Nationalists and the Independent Socialists dissenting). The seven Hanoverians, still resentful of 1866, abstained from voting. Baden and Württemberg, without waiting for the Reich constitution, completed their constitutions in record time—in Mar. and Apr., 1919, respectively. The Saxons took their time, starting as late as Apr. 20, 1920; but six months later they had their constitution ready (Oct. 26, 1920). Bavaria could not begin work on the constitution until the Soviet republic had been crushed. The government submitted the draft on May 28, 1919; the constitutional commission did so well that the full meeting had few objections, and none of them were sub-

stantial; the three readings were accomplished on one day (Aug. 12, 1919) and the constitution was adopted by a vote of 165 to 3 (with one abstention). Hesse completed its constitution by Dec. 12, 1919.<sup>6</sup>

52. The constitutions entered into force on the following dates: Austria, Oct. 1, 1920; Czechoslovakia, Feb. 29, 1920; Yugoslavia (or, rather, the Triune Kingdom of Serbs, Croats, and Slovenes), July 21, 1921; Poland, June 1, 1921; Estonia, June 15, 1920; Latvia, Feb. 15, 1922; Lithuania, Aug. 6, 1922. The Danzig constitution went into force on May 11, 1922; its completion had been delayed by the objections of the League of Nations (see *supra*, pp. 61 ff.); Finland, on the other hand, promulgated its new constitution, incorporating the institutions of existing local autonomy, July 17, 1919.

53. The actual work on the constitution was begun Nov. 20, 1873, and was completed Nov. 30, 1875.

54. National assemblies are usually much too large. Fortunately, the record of the French National Assembly of 1789—some 1,700 members—was never equaled. But the common size in large states—between 500 and 800—is still excessive. The Belgian Congress of 1830 had not more than 200 members, a fact which contributed to its business efficiency. National assemblies should be smaller than ordinary parliaments. A group of 300 to 400 members would be the most suitable.

55. In constitution-making after the First World War, university professors of law played a conspicuous role (Germany, Preuss; Bavaria, Piloty; Hesse, Gmelin; Austria, Kelsen; Finland, Erich; Lithuania, Woldemaras; Czechoslovakia, Masaryk—professor of philosophy, not of law). Some people ascribed the ultimate failure of the constitutions to the dogmatism of these and others. The accusation is palpably unjustified, as evidenced by Czechoslovakia and Finland where professorial influence did no harm. But it is obvious that a workable constitution cannot be constructed in a political vacuum; it must be adjusted to national conditions and take into account the frailties of human nature. There is hardly a more "dogmatic" constitution than that of the Philadelphia Convention with its strict separation of powers, endangering national unity, and its checks and balances, inviting deadlocks. On paper it is the most impossible constitution of all; and yet it worked.

56. Space forbids even the most sketchy recapitulation of the material investigated. A pertinent illustration is the constitutional committee of the Weimar assembly (*Verfassungsausschuss der Nationalversammlung*). On this committee of twenty-eight the parties were represented in proportion to their strength (see Stier-Somlo,

*op. cit.*, p. 269). The designations to it resulted in a group with an unusually high quality as a whole. Eminent publicists and lawyers (Kahl, Düringer, Naumann, Beyerle) were joined by prominent parliamentarians (Trimborn, Heinze, Ablass, Haussmann). The committee collaborated closely with the framer of the draft, Minister of the Interior Hugo Preuss, a professor of constitutional law of the Berlin School for Business Administration, and benefited also from the continuous advice of the legal experts of the *Länder*. The *Länder* sent to their own constitutional commissions men of intellectual quality and good team spirit. On the membership of the constitutional commission of thirty elected (Nov. 26 to Dec. 4, 1872) by the French National Assembly, see Deslandres, *op. cit.*, vol. 3, pp. 268 ff. As a group, this was much less capable though it contained a number of outstanding men.

57. Illustrated in the framing of the constitution of Saxony of Nov. 1, 1920. The draft was prepared by the government and submitted to the assembly on Apr. 20, 1920. A constitutional commission of eighteen members devoted fourteen sessions to the first reading, and five sessions to the second. The chamber took only one day for the discussion of the draft (Oct. 26) and accepted it unanimously on the same day (see Walter Schelcher, *Jahrbuch des ö. R.*, vol. 10 [1921] p. 285).

58. On the crop of such private drafts preceding the Weimar Assembly see Stier-Somlo, *op. cit.*, pp. 236 ff.

59. "Parlament und Regierung im neugeordneten Deutschland," published in 1917, reprinted in Weber's *Gesammelte politische Schriften*, (Munich, 1921), pp. 126 ff.; "Wahlrecht und Demokratie," *ibid.*, pp. 277 ff.; "Deutschlands künftige Staatsform," *ibid.*, pp. 341 ff.

60. *Die parlamentarische Regierung in ihrer wahren und ihrer unechten Form* (Tübingen, 1918). Hugo Preuss told this writer that Redslob's book had substantial influence on his constitutional drafts.

61. An interesting experiment was undertaken by Estonia in 1919 (see Eduard Behrendts, *Jahrbuch des ö. R.*, vol. 12 (1923-1924), pp. 191 ff.): A legislative delegation of the national assembly was in charge of ordinary legislation, which was promulgated by the president of the constituent assembly. A division of labor, thus, was accomplished, the national assembly being able to concentrate on the constitution and major issue, its delegation handling routine legislation under its continued control. It was, in a modified form, the method of the French Convention of 1792.

62. See, e.g., Czechoslovakia: Law No. 11 of Oct. 28, 1918 (on the establishment of an independent Czechoslovak state), Art. 2: "All existing legal enactments remain in force for the time being."

German Reich: *Uebergangsgesetz* (Transition Act) of Mar. 4, 1919 (*Reichsgesetzblatt*, p. 285), legalizing the existing pre- and post-revolutionary laws in so far as they did not conflict with the new political order (see Walter Jellinek, *Jahrbuch des ö. R.*, vol. 9 [1920], p. 37).

63. German Reich: The national assembly continued as Reichstag until its successor convened (June 24, 1920). Likewise Ebert was continued as President until June 30, 1925, by Art. 180 of the constitution itself. This most objectionable deviation from the constitution was imitated in Finland on Aug. 4, 1944, when General Mannerheim was elected by the parliament—instead of by the people—as successor to President Ryti, who had resigned. Likewise in Yugoslavia, the national assembly, which was to function only for the enactment of the constitution and the laws directly connected with it (see Law on Elections of Sept. 3, 1920), prolonged itself as normal parliament (*Narodna Skupstschina*) (Art. 140) for the maximum duration of another two years (see Ivan Zolger, *Jahrbuch des ö. R.*, vol. 11 [1922], p. 190).

64. The subject has been covered fully in the standard work by Sarah Wambaugh, *A Monograph on Plebiscites* (New York, 1920), a monumental collection of facts which today are of relative value only unless supported by insight into the psychological implications of the plebiscite technique. A plebiscite may technically be perfect, through supervision by international agencies and other rational devices, and yet be far from reflecting the will of the voters because no procedural arrangements can eliminate or neutralize the influence of propaganda and intimidation. The Saar plebiscite of 1935 is a case in point. But it may be granted that prior to the totalitarian perversion of the institution it was productive, under favorable circumstances, of reasonably fair results. In passing, mention may be made of this writer's objections to the institution as such some thirty years ago, in: "Ueber Volksabstimmungen bei Gebietsveränderungen," *Annalen des Deutschen Reichs* (1917), pp. 593 ff.

65. This subject with its antecedents is fully discussed by Karl Loewenstein, *Volk und Parlament nach der Staatsauffassung der französischen Nationalversammlung von 1789* (Munich, 1922). See also Robert Redslob, *Die Staatstheorien der französischen Nationalversammlung von 1789* (Leipzig, 1912), pp. 105 ff., 151 ff.

66. See A. Aulard, *Histoire politique de la Revolution Française*, 6th ed. (Paris, 1926), p. 309. The vote was to be taken in the primary assemblies either by oral assent entered into a record (*procès verbal*) or by ballot (*scrutin*). The result was 1,801,918 to 11,610. Aulard concluded that, in view of the electoral habits of the time, the

vote was sincere and spontaneous though abstentions were very considerable.

67. See Karl Loewenstein, "The Dictatorship of Napoleon the First," *South Atlantic Quarterly*, vol. 34 (1936), pp. 298 ff.; *idem*, "Opposition and Public Opinion Under the Dictatorship of Napoleon the First," *Social Research*, vol. 4 (1937), pp. 461 ff.

68. See on its application under the Hundred Days *supra*, p. 239 and Deslandres, *op. cit.*, vol. 1, p. 764. Napoleon III used it on Dec. 21-22, 1852 (on the Imperial constitution see Deslandres, *op. cit.*, vol. 2, pp. 459 ff.) and on May 8, 1870 (on the liberal constitutional reforms see Deslandres, *op. cit.*, pp. 671 ff.).

69. Hitler staged elections of the Reichstag, amounting to a plebiscite on the regime, in 1933, 1936, and 1938, in addition to one genuine plebiscite on his usurpation of the powers of the Reich president on Aug. 19, 1934 (see Karl Loewenstein, *Hitler's Germany*, 4th ed., New York, 1944, pp. 64). In all four cases the vote was taken only after the decision had been made, and thus was only a propagandistic gesture. Mussolini was more modest. He arranged only two plebiscites (1924 and 1929) wrapped in elections of a new parliament. See Arnold T. Zurcher, in James T. Shotwell, *op. cit.*, pp. 640 ff.

70. Brazil's Vargas had promised it in the constitution of 1937 (Art. 187); his failure to deliver contributed to his fall.

71. See the first Decree of Peace of the All-Russian Convention of Soviets of Workers, Peasants, and Soldiers of Nov. 8, 1917, and Trotsky's elaborate eulogies during the Brest Litovsk peace negotiations.

72. In the first plebiscite of 1920 the Venizelists were defeated and King Constantine was recalled by an "overwhelming" majority. In the plebiscite of 1924, no less "overwhelming," the monarchists abstained from voting—as the republicans in turn did in the plebiscite of Nov. 3, 1935, recalling King George II with similarly "overwhelming" percentage.

73. Of the six constitutions enacted in Switzerland since 1798, five were accepted by popular ratification, the only exception being the "mediated" constitution of Napoleon of 1801. Under the constitution of 1874 (Arts. 118-123) Switzerland distinguishes between partial and total revision of the constitution. The cantons operate under the same principle.

74. Constitution of Mar. 21, 1919, Sec. 65. It was accepted by the people on Apr. 18, 1919, with a majority as genuine as it was overwhelming.

75. For example, the German Reich, Arts. 73 ff.; Austria, Constitution of 1920 as amended in 1925-1929, Arts. 43 ff.; Hesse, Con-



stitution of Dec. 19, 1919, Sec. 65. See also the constitution of Eire of 1937 (Arts. 27, 46, 47).

76. In Chile the electorate ratified the Alessandri constitution of 1925 on Aug. 30, 1935. The constitutions of Uruguay of 1934 and 1942 were both accepted by the people. See also Andrés María Lacano y Mazón, *Constituciones políticas de América* (Habana, 1942), vol. 2, Index (on constitutional amendment).

#### CHAPTER IV

1. Exact statistical data on trials and convictions of collaborationists are not available. By Apr. 30, 1945, the total of death sentences was given as 1,458. General de Gaulle, as president, exercises the privilege of pardon, but refused to reveal the number of capital punishments he had commuted. At that time some 10,500 persons had been sentenced to prison terms of varying length. A total of 50,000 could be expected. It is surprising to learn that the figures are relatively higher in Belgium than in France. The Minister of Justice announced in the chamber that up to Nov. 9, 1944, 913 persons had been shot and 56,000 were under arrest. The number of illegal executions in both countries probably never will be known. In Italy complaints about laxity in dealing with Fascists and collaborationists are widespread and seemingly justified. According to official figures up to Apr., 1945, the High Commission for the Purging of Fascist Crimes had investigated 4,854 cases, and 4,451 of these had been referred to the judicial authorities, who had completed not more than 138. (See Mario Rossi, "Fascism Without Mussolini," *Nation*, May 19, 1945, p. 572.)

2. For illustration see Belgium, Decree-Law of the government-in-exile of Jan. 10, 1941 (*Moniteur Belge*, Feb. 25, 1941—see Henry Fayet, *Journal of Comparative Legislation and International Law*, vol. 25 [1943], p. 39), and Luxembourg, Decree of Apr. 22, 1941 (abrogation of all enemy measures and voidance of all acts infringing upon the rights of property whether public or private, since May 10, 1941—see E. Cohn, *ibid.*, p. 45).

3. The problem was not wholly unfamiliar to previous periods of political reconstruction. The reaction after 1815 in France demanded that the holders of national property acquired during the Revolution be expropriated. See, for example, Law of Apr. 27, 1825, on the indemnity to be granted to the former proprietors of confiscated property sold for the benefit of the state (Deslandres, *op. cit.*, vol. 2, p. 16).

4. Ordinance on the organization of the public powers in liberated France of Apr. 24, 1944 (Ser. II, No. 866 F), Arts. 1, 17.

5. The Nazis retained the former republican electoral system

(Reichswahlgesetz of Mar. 6, 1924 [*Reichsgesetzblatt*, pt. I, p. 159]) without basic changes. In Austria the authoritarian Dollfuss-Schuschnigg regime held no democratic elections (see Norbert Gürke, "Die Verfassung Oesterreichs," *Jahrbuch des ö. R.*, vol. 24 [1937] pp. 166 ff.). The pre-authoritarian electoral law of Austria is that of July 20, 1920 (see Hans Kelsen, *Die Verfassungsgesetze der Republik Oesterreich*, Vienna-Leipzig, 1920, pp. 105 ff., 117 ff.); the reforms of 1925 and 1929 respectively left the principles intact but changed the voting age from twenty to twenty-one years and raised the age of eligibility from twenty-five to twenty-nine years.

6. Naturally the British Proportional Representation Society grinds here its ax, in a widely distributed pamphlet by Wilson M. Southam, *An International Electoral Commission* (Montreal, 1943), which recommends such a commission to supervise the first elections after the war in all countries to be based on proportional representation. See also John H. Humphreys, *The Postwar Free World Elections and Government*, Montreal (reprinted from *Free World*, Nov. and Dec., 1943).

7. See Arnold J. Zurcher, in Shotwell, *op. cit.*, p. 659.

8. For Argentina (after the Uriburu revolution of 1930) see Karl Loewenstein, "Legislation Against Subversive Activities in Argentina," *Harvard Law Review*, vol. 46 (1943), p. 1281, n. 47. For Chile (in the hectic period after the First World War) see *idem*. "Legislation for the Defense of the State in Chile," *Columbia Law Review*, vol. 44 (1944), p. 399.

9. Every new legislative body or national assembly since 1789 has contained men of the preceding regimes, even at the risk of having them in opposition. For the French National Assembly of 1848 see Deslandres, *op. cit.*, vol. 2, p. 321.

10. It is surprising, to say the least, that the American reconstruction experience is completely neglected in the preparation of European political reconstruction. The reason may be psychological because popular opinion, still ashamed of the errors and crudities of that period, performs what to psychoanalysts is known as the process of *Verdrängung*. Sketchy remarks are found in C. Arnold Anderson, "The Utility of the Proposed Trials and Punishment of Enemy Leaders," *Amer. Polit. Sci. Rev.*, vol. 37 (1943), p. 1084 (following the general line of attributing the failure of reconstruction to the vindictiveness of the North); see also Quincy Wright, "The Transitional Period," *Commission for the Study of Peace, 3rd Report* (New York, 1942), p. 266.

11. Sec. 3 reads as follows: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States,

or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

12. The factual material is gathered chiefly from John W. Burgess, *Reconstruction and the Constitution* (New York, 1902); Hockett, *op. cit.*, vol. 2, pp. 253 ff.; Howard K. Beale, "Reconstruction," in *Encyclopaedia of the Social Sciences*, vol. 13, pp. 168 ff. See also J. G. Randall, *The Civil War and Reconstruction* (Boston, 1937); W. A. Dunning, *Reconstruction: Political and Economic* (New York, 1907); E. McPherson, *Political History of the United States During the Period of Reconstruction* (3rd ed. Washington, 1880). Texts are found in H. S. Commager, ed., *Documents of American History* (New York, 1934).

13. For text of original oath see Burgess, *op. cit.*, p. 10. In its later modified form it reads as follows: "I ——— do solemnly swear\* in the presence of the Almighty God that I shall henceforward faithfully support, protect, and defend the Constitution of the United States and the Union of the States thereunder, and that I will in like manner abide by, and faithfully support, all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves. So help me God." The original "ironclad" oath was repealed by Congress in 1871.

14. The exempted categories were the following (see Burgess, *op. cit.*, pp. 33 ff.): (1) Persons who had held civil or diplomatic office under the Confederacy; military persons above the rank of colonel in the Army or lieutenant in the Navy; all graduates of West Point or the Naval Academy; governors of insurrectionist states. (2) Persons who had left seats in Congress or in the federal judiciary in order to aid the rebellion, or who had resigned from the Army in order to avoid service against the rebellion. (3) Persons guilty of abuse of men in the service of the Union, in conflict with the statutes on prisoners of war. (4) Commercial raiders on the high seas or on the Great Lakes, and raiders from Canadian soil against the Union. (5) Persons who had deserted the Union in order to aid the Confederacy. (6) Prisoners of war at the time when the oath was to be taken, and those who had taken it since Dec. 8, 1863, and had violated it since. (7) Persons owning taxable property worth more than \$20,000 who in any way had aided the rebellion.

\* Or affirm.

15. *Op. cit.*, p. 150. In some cases the framers of the new state constitutions went far beyond the federal requirements and disfranchised all persons who had taken even the smallest part in the rebellion. Provisions for escaping disfranchisement, which usually was identical with disqualification for office, were so undignified that no respectable person would invoke them.

16. It was proposed on Apr. 30, 1866, by the famous Congressional Joint Committee on reconstruction to inquire into the condition of the states lately in rebellion (see Burgess, *op. cit.*, pp. 42 ff., 73 ff.).

17. Enforcement Act of May 30, 1870; Ku-Klux Klan Act of Apr. 20, 1871; Federal Election Act of June 10, 1872.

18. The Slaughter House cases, 16 Wall. 36 (decided Apr. 14, 1873); *U.S. v. Harris*, 106 U.S. 629 (1882); *U.S. v. Stanley*, 109 U.S. 3 (1883).

19. Sec ordinance on the Provisional Consultative Assembly of Sept. 17, 1943, Sec. 8, and ordinance on the organization of the public powers in France after the liberation of Apr. 24, 1944, Sec. 18; the two sections are practically identical.

#### CHAPTER V

1. See Lewis L. Lorwin, *Postwar Plans of the United Nations* (New York, 1943), pp. 292 ff.

2. This was clearly realized when new constitutions were under preparation after the First World War. But agrarian reform succeeded only in Czechoslovakia and the Baltic states. In all others, it failed signally. In Germany not only the Junkers class—whose political influence is popularly much overrated—but the industrialists who had become landowners on a grand scale were able to prevent it.

3. Cecil T. Carr, "A Regulated Liberty," *Columbia Law Review*, vol. 42 (1942), pp. 339 ff.

4. See *The Republics of South America* (London: Royal Institute of International Affairs, 1937), pp. 166 f. For a comprehensive appraisal of the prewar situation see Karl Loewenstein, "The Balance Between Legislative and Executive Power," *Univ. of Chicago Law Review*, vol. 5 (1938), pp. 566 ff.

5. The chronology is persuasive: Turkey and Hungary, 1920; Italy, 1922; Spain (Primo de Rivera), 1923; Greece (Pangalos), 1925; Lithuania (Woldemaras), 1926; Portugal (de Costa, Carmona), 1926; Poland (Pilsudski), 1926; Austria (Heimwehr constitution), 1929; Yugoslavia (dictatorship of King Alexander), 1929; Portugal (Salazar), 1932; Germany, 1933; Austria (Dollfuß), 1934; Bulgaria (royal dictatorship), 1934; Estonia (Paets), 1934; Latvia (Ulmanis),

1934; Poland, 1935; Greece (royal dictatorship and Metaxas), 1936; Spain (Franco rebellion), 1936; Rumania (royal dictatorship), 1938. Of all these countries only Estonia returned to democratic rule (1936).

6. France from Poincaré (1926) to Daladier and Reynaud (1939-1940) was the classical land of *pleins pouvoirs*. But the practice occurred also in Belgium and Czechoslovakia.

7. Elimination of the so-called splinter parties was attempted by legislation prescribing through election deposits and minimum vote requirements for participation in the electoral contest.

8. The technique consisted in assigning the majority of seats in the parliament to the party which won a plurality in the election. The classic case is the Acerbo law (1924) in Italy (see Arnold J. Zurcher in Showell, *op. cit.*, p. 619); it was imitated in Rumania and elsewhere.

9. Indicative of the trend is the grant of irrevocable full powers by the Provisional Representative Assembly to the French provisional government, as envisaged in Art. 25, sec. 3, of the decree of the French Committee of National Liberation of Apr. 24, 1944. These are to remain in force until the final National Assembly has been convened.

10. See Karl Loewenstein, *Univ. of Chicago Law Rev.*, vol. 5 (1938), pp. 575 ff.

11. Technical details cannot be discussed here. It is feasible to distinguish between technical and political legislation, the latter being the legitimate domain of parliament. Likewise it is possible to combine committees of the parliament with the government experts in the preparation of the bills.

12. The Weimar constitution (Art. 25) sensibly provided that the government might not dissolve the Reichstag twice for the same reason. At the time when the cabinet of von Papen violated this provision (1932) the constitution was no longer observed.

13. The two most famous illustrations are the constitutional crisis in Britain over the Great Reform (1832) and the conflict preceding the Parliament Act of 1911. In both cases the House of Lords, fearing for its prerogatives, obstructed liberal reform, and the crown, acting on the advice of the government supported by a majority in the Commons, broke the deadlock by the threat of appointing enough new peers to ensure the enactment of the controversial bills. Probably in most other countries the conflict would have led to illegality if not revolution.

14. The fall of the Weimar republic is a pertinent case in point. The constitution was badly constructed from the start. Under Art. 53 the Reich chancellor was appointed at the discretion of the Reich

president; under Art. 54 he required the confidence of the Reichstag. A deadlock was inevitable—solved, in 1932, by illegal action of the Reich president. Von Hindenburg appointed and maintained in office a Reich chancellor (von Papen) who failed to obtain the confidence of the Reichstag. See Karl Loewenstein in Shotwell, *op. cit.*, pp. 383 ff.

15. See on this subject Joseph-Barthélemy, *op. cit.*, pp. 240 ff.; A. Esmein, *Traité du droit constitutionnel français et comparé*, 7th ed. (Paris, 1921), vol. 2, pp. 86 ff.; Kurt Reber, *Das Notrecht des Staates* (Zurich, 1938) (for Switzerland),

16. See, as illustrations, the French laws on the state of siege of Aug. 9, 1849, and of Apr. 3, 1878 (Joseph-Barthélemy, *op. cit.*, pp. 759 ff.) and the British Emergency Powers Act of 1920 (10 and 11 Geo. 5 ch. 55). Similar statutes exist in numerous Latin American states, including: Nicaragua, Ley Marcial o de Orden Pública of Mar. 29, 1939; Bolivia, Decree No. 2190 of Dec. 19, 1941; Bolivia, Supreme Decree of Apr. 13, 1942; Mexico, Law of June 11, 1942.

## PART FIVE

### CHAPTER I

1. John Chamberlain, *New York Times*, June 24, 1944.
2. *Current History*, vol. 7 (1944), no. 40, pp. 509 ff.
3. *Current History*, vol. 8 (1945), no. 43, pp. 259 ff.
4. See Ernst Fraenkel, *Military Occupation and the Rule of Law* (New York, 1944); Raphael Lemkin, *Axis Rule in Occupied Europe* (New York, 1944).
5. See Clifton Daniel, *New York Times*, May 13, 1944, sec. 4.
6. *New York Times*, Aug. 11, 1944.
7. "Political Commissioner" perhaps would be the better title except for the significance of the term in Soviet practice.
8. For literature see Oppenheim-Lauterpacht, *op. cit.*, vol. 1, pp. 167 (Egypt), 189 (Iraq), 180 (Syria and Lebanon).
9. See *Cambridge Modern History*, vol. 10, p. 11. The committee received daily reports on the state of the country from the King's cabinet. Its advice on any question of internal or external politics could be made effective by the occupation army.
10. On reservation and disallowance see A. Berriedale Keith, *The Sovereignty of the British Dominions* (London, 1929), pp. 223 ff., and *The Constitutional Law of the British Dominions* (London, 1933), pp. 21 ff.
11. See Ernst Isay, *Die Isolierung des deutschen Rechtsdenkens*,

for a remarkably farsighted discussion of how Germany had isolated herself from the legal and social ideals of the Western world.

12. For a magistral treatment, see Heinrich Triepel, *Die Hegemonie: Die Lehre von den führenden Staaten* (Berlin, 1938).

## CHAPTER II

1. The gory and sensational titles referred to in the text are all of recent books. It is not intended to minimize the value of books containing actual observations on the Nazi nightmare such as Gregor Ziemer's *Education for Death* (New York, 1943) or brilliant historical studies like John Wheeler-Bennett's *The Forgotten Peace* (New York, 1938) and William Ebenstein's *The German Record* (New York, 1945). Nor should the reportorial records of eyewitnesses like Harson, Shirer, Stowe, Fredborg, and Lochner be forgotten, many of them masterpieces. But none of them arrives at a wholesale condemnation of the Germans, as distinct from the Nazis.

2. The best treatment of the subject is H. Lauterpacht, *An International Bill of Rights* (New York, 1945—published after this manuscript was completed). Prof. Lauterpacht is one of the very few who clearly realize the interdependence of the internal form of government and a stable international organization (see, for example, pp. 14 ff., 88, 136 f.); and he seems to stand alone in wishing to implement the traditional individual freedoms by an explicit "political right," which, in Art. 10 of his draft proposal, is formulated as follows (pp. 134 ff.): "No State shall deprive its citizens of the effective right to choose their governments and legislators on a footing of equality, in accordance with the law of the State, in free, secret, and periodic elections." For somewhat older discussions see George A. Finch on the Declaration of the International Rights of Man by the Institut de Droit International (1929), *Amer. Jour. of Internat'l Law*, vol. 35 (1941), p. 663; André N. Mandelstam, "La Protection internationale des droits de l'homme," *Recueil des cours de l'Académie de Droit International*, vol. 38 (1931, IV), pp. 123 ff.; Jacques Dumas, "La Sauvegarde internationale des droits de l'homme," *Recueil, etc.*, vol. 59 (1937, I), pp. 5 ff. Lately, under the impact of the awareness that international guarantee of the rights of man and world peace are interconnected, the literature has increased considerably in volume and realistic approach. See Quincy Wright, "The Transition Period," *Third Report of Commission for the Study of Peace* (New York, 1942); Wilfrid Parsons, *America's Peace Aims*, pamphlet no. 28 of Catholic Association of International Peace (Washington, 1943); statement of "The Essential Human Freedoms," drafted by a committee representing the principal cultures of the world, appointed by the American Law

Institute, Feb. 7, 1944 (see *supra*, n. 8 on chap. III—the project is now sponsored by Americans United for World Organization, Inc.). See also the Declaration of Human Rights by the American Jewish Committee, printed in its *Committee Reporter*, vol. 2, no. 1 (Jan., 1945), which states (Point 2): "No plea of sovereignty shall ever again be allowed to permit any nation to deprive those within its borders of these fundamental rights on the claim that these are matters of internal concern."

As far as can be seen none of these projects, except that inaugurated by the American Law Institute, includes among its postulates a political right proper.

3. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, pp. 290 ff.; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, 1915), pp. 330 ff.

4. A pertinent parallel is found in the application of the minority treaties after the First World War (see *supra*, pp. 54 ff.). Although after 1919 the succession states had obligated themselves to protect their minorities, and some of them had incorporated such protection even into their constitutions, the municipal courts consistently denied their nationals access to the League of Nations as the internationally established agency for violations of minority provisions. Such complaints were considered as disloyalty or even punished as treason. Internal self-determination always took precedence over the right to appeal to the League or an international court.

5. See Oppenheim-Lauterpacht, *op. cit.*, vol. 1, pp. 111 ff.; Hans Aufricht, "Personality in International Law," *Amer. Polit. Sci. Rev.*, vol. 37 (1943), pp. 255 ff.

#### CHAPTER III

1. In the Geneva Covenant it was Art. 15, no. 8; in the Dumbarton Oaks proposals it is Chap. VIII, Sec. A, Par. 7.

2. "Puntos de Vista del Gobierno Uruguayo para la Organización de Posguerra," published in *El Día* (Montevideo) Sept. 29, 1944.

3. Quoted in *Time*, Nov. 27, 1944.





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